SUPREME COURT, U. S.

FILED

MAR 29 1968

JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACK, SAND LAKE AND NORTH GREENBUSH, RENSSELAER COUNTY AND CHATHAM, COLUMBIA COUNTY AND BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD AND OYSTER BAY, NASSAU COUNTY, NEW YORK,

*Appellants,*

—v.—

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

*Appellee,*

—and—

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH, and BARBARA BRENNAN,

*Intervenor-Appellees.*

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

## BRIEF OF INTERVENOR-APPELLEES

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

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## BRIEF OF INTERVENOR-APPELLEES

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### Opinions Below

The majority and dissenting opinions in the New York Court of Appeals are reported at 20 N.Y.2d 109, 228 N.E. 2d 791, 281 N.Y.S.2d 799 (63a).* The majority and

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* References in parentheses are to the pages of the Joint Appendix unless otherwise indicated.

concurring opinions in the New York Supreme Court, Appellate Division, Third Department, are reported at 27 A.D.2d 69, 276 N.Y.S.2d 234 (45a). The opinion of the New York Supreme Court, Albany County, is reported at 51 Misc.2d 297, 273 N.Y.S.2d 239 (29a).

## Constitutional and Statutory Provisions Involved

Constitution of the United States, Amendment I: Establishment of Religion and Free Exercise of Religion Clauses;

Constitution of the United States, Amendment XIV: Due Process and Equal Protection Clauses;

Section 701, subdivision 3, New York Education Law, as amended L. 1965, C. 320; L. 1966, C. 795, 16 McKinney's Consol. Laws of New York, § 701.3 (See Supplement A to this brief, pp. S 1-4).

## Question Presented

The New York Legislature, for the declared public purpose of maintaining quality education in secular subjects which all public and private school pupils are required under New York law to study, has enacted a statute providing for the free loan of secular-subject textbooks approved by the public school authorities to all children enrolled in grades seven to twelve in any school—public or private—which complies with the State compulsory education law. The textbooks are loaned upon request to individual students, not to their schools, and those requesting students are made personally accountable for the books.

This litigation poses a single issue:

> The State having enacted such a statute for the general public welfare, does the Establishment Clause require the State to exclude from the educational benefits of that statute those children—and only those children—who attend religiously-affiliated schools?

## Statement of the Case

Chapter 320 of New York Laws of 1965 (effective September 1, 1966) amended Section 701 of the New York Education Law to provide that boards of education shall have the power and duty to lend textbooks "designated for use in any public, elementary or secondary schools of the state or . . . approved by any boards of education, trustees or other school authorities" * . . . "upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law . . ." (See Supplement A to this brief, pp. S 1-4, for full text.) A further amendment made by Chapter 795 of New York Laws of 1966 provides that such textbooks shall be loaned to children in public and private schools "on an equitable basis", and sets top limits on the amounts which any school district is required to expend ($15 times the number of children enrolled in all schools for each year up to 1969, and $10 thereafter). This amendment also defined a "textbook" as a book "which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends."

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* The statutory definition of "school authorities" in Educ. L. §2(12) makes it plain that this phrase means the *public* school authorities.

Subdivisions 6 and 7 of the Act (Supplement A to this brief, pp. S 3-4) provide for State reimbursement to school districts of sums expended for textbooks supplied to pupils under the Act.

The statute has been implemented by an official opinion of the Counsel to the Education Department* which emphasizes that the textbooks must be secular:

> "a. The textbooks [must] be non-sectarian (this eliminates denominational editions and those carrying the 'imprimatur' or 'nihil obstat' of a religious authority)." (Opinion of Counsel No. 181, ¶6 (July 8, 1966), issued by State Education Department.) (See Supplement B to this brief, pp. S 6-7)

The statute has been authoritatively construed by the New York Court of Appeals to require that the textbooks be secular. 20 N.Y.2d at 117, 228 N.E.2d at 794-95, 281 N.Y.S. 2d at 805 (67a).

The textbooks must be loaned to the individual pupils, who are held accountable for them, and not to any school. (Opinion of Counsel No. 181, ¶7; Supplement B, p. S-7)

The Textbook Loan Act embodies the New York Legislature's recognition that availability to all children of quality education in secular subjects is a matter of pressing public concern. The preamble declaring the Legisla-

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* On January 10, 1966 the Education Department issued a memorandum of tentative "suggestions for administration of the program," which is referred to in the amicus curiae brief of the American Jewish Committee, et al. (pp. 43-48). Subsequently, however, authoritative official guidelines were issued by the Education Department in its Opinion of Counsel No. 181, and it is this subsequent controlling opinion which is cited both in this brief and in the brief for appellants.

ture's purposes in enacting the amendment to Section 701 states:

> "Section 1. Statement of policy. The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of *science, mathematics, foreign languages and other non-sectarian subjects.* The Congress of the United States has reaffirmed the principle that the states and local communities retain primary responsibility for public education. *It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state.*" N. Y. Sess. Laws 1965, Ch. 320, §1. (emphasis added)

In this action plaintiffs sought a declaratory judgment against the Commissioner of Education of New York that the Textbook Loan Act is on its face contrary to the New York State Constitution and to the Establishment Clause* of the First Amendment *only* "in so far as it provides for the purchase of textbooks with public moneys for free loan to pupils attending religious schools" (Complaint, ¶16 (6a); *cf.* "Questions Presented" in appellants' brief, p. 3).

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* The complaint nowhere mentions the Free Exercise Clause.

Plaintiffs do not claim that the statute is unconstitutional in so far as it provides for the loan of books to pupils attending either (i) public schools or (ii) non-religiously-affiliated private schools.*

The intervenor-defendants are the parents of children residing in the East Greenbush School District and attending Catholic parochial schools pursuant to the compulsory education law. Before the Act, all of those parents (and others similarly situated) had purchased at their own expense the textbooks which their children had been using (14a). Under the new Section 701, those children are entitled to, and are receiving, secular textbooks under loan as provided in that Section.

Both the Commissioner and the intervenor-parents served answers asserting the constitutionality of the Textbook Loan Act. The Commissioner interposed a defense that under State law the plaintiffs had no standing to sue. The intervenor-parents took no position on the issue of standing to sue, but raised affirmative defenses alleging that to forbid the loan of secular textbooks to children in lawful attendance under the compulsory education laws at private schools conducted under religious auspices, while permitting the loan of such textbooks to children attending other private schools not under religious auspices, would be an interference with the free exercise of religion, a denial of the [illegible]al protection of the laws, and a denial of liberty and p[illegible] without due process of law, contrary to the First, F[illegible]ourteenth Amendments to the Con-

* Latest av[illegible]ures from the State Education Department indicate that t[illegible] presently some 246 non-religiously-affiliated private school[illegible] State, with a total of over 42,000 pupils.

stitution of the United States and corresponding provisions of the State Constitution (24a-26a).

All parties moved for summary judgment. The Supreme Court, Albany County, ruled that plaintiffs had standing to sue under New York law, and ruled in favor of plaintiffs on the merits (29a-42a; 51 Misc.2d 297, 273 N.Y.S.2d 239 (1966)). The Appellate Division, Third Department, reversed, holding that plaintiffs lacked standing to sue (45a-47a; 27 A.D.2d 69, 276 N.Y.S.2d 234 (1966)). Although three of the justices in the Appellate Division found it unnecessary to rest their decision on the merits because of their determination that the plaintiffs lacked standing to sue, all five Appellate Division justices were unequivocal in their opinion that the statute contravened neither the New York nor the United States Constitution (45a, 47a-60a; 27 A.D.2d at 71, 75-80, 276 N.Y.S.2d at 237, 241-46).

The Court of Appeals reached the merits, holding that the statute was a constitutional exercise of the Legislature's authority to provide for the secular education of all children within the state, and did not contravene either Article XI, Section 3 of the New York Constitution or the First Amendment to the Federal Constitution (63a-68a; 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967)). The Court dealt first with constitutionality under Article XI, Section 3 of the New York Constitution, which prohibits use of state money, property, or credit "directly or indirectly, in aid or maintenance" of any church-related school. The Court held that, since the Textbook Loan Act was designed not to aid religion either directly or indirectly but to benefit all school children by improving their secular education, "any benefit accruing to . . . [religiously-affiliated] schools is a

collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly" (66a; 20 N.Y.2d at 116, 228 N.E.2d at 794, 281 N.Y.S. 2d at 804). The Court noted the essential similarity of the textbook loan program to the activities of public libraries, which routinely loan books to parochial school students for use as aids in their course work without any suggestion that the state is thereby providing unconstitutional aid to religiously-affiliated schools.

The Court observed that:

> "No one in the last third of the 20th Century can doubt that a program aimed at improving the quality of education in all schools is a matter of legitimate State concern ...
>
> "At a time when we have large-scale Federal and State aid to education, it is justly feared that children who are denied these benefits may receive education inferior to children in public schools. Unless certain types of aid can be made available to *all* children, we run the risk of creating an educational lag between children in public and private schools" (66a-67a; 20 N.Y.2d at 116-17, 228 N.E.2d at 794, 281 N.Y.S.2d at 804).

For the same reasons the Court held that there was no violation of the First Amendment:

> "The State makes no affirmation of religious beliefs or activities within the public schools. Section 701 remains completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question

about what school he attends. Despite the flexibility of the English language, it is impossible to conclude that loaning nonreligious textbooks to all students, including those who attend a parochial school, establishes a religion or constitutes the use of public funds to aid religious schools. (cf. *Everson* v. *Board of Educ.*, 330 U. S. 1, 16, 18.)

"As a practical matter, to deny private school children the benefit of the State aid provided by section 701 could widen the gap between those children in deprived areas who attend parochial schools and those attending public schools in the same areas who receive the benefits of all the many and necessary programs backed by the massive resources of both State and Federal Governments" (67a-68a; 20 N.Y.2d at 117-18, 228 N.E.2d at 794-95, 281 N.Y.S.2d at 804-05).

The dissenting judges in the Court of Appeals, while stating that it "is by no means clear" that the statute does not violate the Federal Constitution, did not come to the conclusion that it did (68a, 71a-76a; 20 N.Y.2d at 120, 228 N.E.2d at 796-97, 281 N.Y.S.2d at 807).

## Summary of Argument

In 1965 the State of New York, faced with an indefinitely expanding educational crisis, enacted the Textbook Loan Act as a response thereto. The means were well designed to achieve the end. Prior to the Act, the free loan of textbooks, at public expense, to New York's public school children was on a local option basis, while the State's non-public school children—over 20% of the total school population—received no such loan. The result was that a great number of school children were using worn or outdated textbooks or had none at all. This problem was especially acute in the large urban centers of New York, with their multi-racial complexion and poverty-distressed areas.

The Act in the first year of its operation has been a contributing force in helping to stem the tide of educational deterioration in the State. In the school year 1966-67 textbooks were supplied under the Act to both public school children and non-public school children, most of the latter attending religiously-affiliated schools highly regulated by the State to assure adequate secular education.

Appellants attack the Act, under the Establishment Clause of the Federal Constitution, because of its inclusion of these latter children among all the students who are its beneficiaries. On this ground they ask this Court to terminate the textbook benefits of the Act for this particular group of New York's school children, and for them only. They attack the Act on its face and not in its application.

Appellants' extreme position lacks both a factual foundation and a constitutional basis under the rationale of prior decisions of this Court which support the validity of the Textbook Loan Act.

In *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963), this Court, carrying forward the teachings of its prior decisions respecting both Free Exercise and Establishment, enunciated a test which recognized the "competing demands" of these concepts, and the fact that "the line which separates the secular from the sectarian in American life is elusive". 374 U.S. at 231. The Court's test is directly applicable to welfare legislation which extends general public benefits to individuals served by religious agencies. This test does not permit solution of serious problems relating to social welfare and religious liberty by simplistic slogans of "church-state separation" or "child benefit". Rather it permits the Court to weigh factual situations on a case-by-case basis to determine whether in fact the legislation fulfills a "secular legislative purpose" and whether in fact it has a "primary effect that neither advances nor inhibits religion" (374 U.S. at 222). That test is applicable here.

The facts of this case, as set forth in the Statement of the Case and analyzed in Point I of this brief (pp. 3-9, 13-28), amply demonstrate that the Act, in its educational benefit not only to public school pupils but to all pupils, including those in religiously-affiliated schools, effectively carries out a vital public purpose. Appellants base their main argument upon the contention that the Act supports religious institutions. Under this Court's decision in *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370 (1930), applied to the facts of this case, no benefit to any institution, religious or otherwise, results within the meaning of the Constitution. The public is the beneficiary.

This Court's later decision directly on the Establishment Clause issue in *Everson* v. *Board of Education*, 330

U.S. 1 (1947), lends no support to the contention of appellants but on the contrary gives strong support to that of intervenor-appellees. *Everson's* classic definition of church-state separation is in no wise offended by the Act, which neither calls for nor permits support of religion, religious activities or institutions. *Everson's* careful discussion of the nature of "welfare" legislation, and its holding that the Establishment Clause does not bar a child attending a religiously-affiliated school from participating in the benefits of general welfare legislation enabling him to get a secular education, plainly points to the constitutionality of the Act.

In the light of the facts of this case, there can be no doubt that the Textbook Loan Act fulfills a secular legislative purpose. Ignoring this significance of the Act, appellants seek to persuade this Court to take judicial notice of a mass of unproved assertion and speculation which they present as argument that the Act, despite its secular legislative purpose, has a primary effect that advances religion. Both the facts of this case and the First Amendment cases decided by this Court contradict appellants' contention.

The New York Textbook Loan Act is not unique, and the weight of authority of the highest state courts is on the side of constitutionality of the Act.

Finally, appellants now say (although they did not mention it in their complaint) that the Act violates the Free Exercise Clause. Plainly, it does not. If there is a Free Exercise issue in this case, it is that which would result from the termination, as to one particular class of school children involved, of the general benefits provided by the Act and now enjoyed by all children.

## I.

## The State of New York Determined That the Act, With Its Controls, Fulfills a Major Public Purpose

The preamble to the Textbook Loan Act (*supra*, p. 5) states the judgment of the New York Legislature that the Textbook Loan Act serves critical public needs and expresses important public policy respecting the education of youth. This judgment will be highlighted by examination into the facts of New York's educational crisis and a description of how the Act, embodying detailed public controls, responds to that crisis.

### The Educational Crisis

The questions presented by this case are of paramount importance because of the crucial role of education in the United States today.

In his 1965 State of the Union address, President Johnson said:

> "Every child must have the best education that this Nation can provide." 111 Cong. Rec. 26, 28 (Jan. 4, 1965).

In his Education Program Message of January 12, 1965, President Johnson emphasized the relationship between a high level of education and the achievement of basic individual and community goals:

> "One hundred years ago, a man with 6 or 7 years of schooling stood well above the average. His chances to get ahead were as good as the next man's. But today, lack of formal education is likely to mean low wages, frequent unemployment, and a home in an urban or rural slum.

Poverty has many roots but the taproot is ignorance."

• • •

"Nearly half the youths rejected by Selective Service for educational deficiency have fathers who are unemployed or else working in unskilled and low-income jobs."

• • •

"The burden on the Nation's schools is not evenly distributed. Low-income families are heavily concentrated in particular urban neighborhoods or rural areas. Faced with the largest educational needs, many of these school districts have inadequate financial resources." 111 Cong. Rec. 499, 500.

Government programs to improve education result from the significant relationships between inadequate education and unemployment, poverty, and crime and from "educational implications inherent in technological developments and the relation of education to national preparedness." See S.Rep. No. 146 on the Elementary and Secondary Education Act of 1965, 89th Cong., 1st Sess., p. 1 (1965). Such programs are designed not only to help eliminate clear social evils such as poverty but also to assure that all students in this country receive an education that will encourage and enable them to make full use of their capacities.

This Court has itself recognized and stimulated the expanding importance of education in the United States in the second half of the twentieth century. In *Brown* v. *Board of Education,* 347 U.S. 483 (1954) the Court declared:

> "Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." (347 U.S. at 493)

This Court's declaration reflects the fact that provision for adequate elementary and secondary education for all students is today considered just as essential to the public welfare as health and safety legislation. This heightened recognition of the crucial role of education in modern society has led to a significant expansion of state and federal aid to education because of the inability of local governmental units to meet the financial burden imposed by present and future educational requirements. Thus, in 1925-26, the total New York State public-school education budget was $210,987,750, of which 75.1% came from local taxes; 20.6% from State aid, and 4.3% from all other sources. In 1964-65 (the latest year for which published figures showing the breakdown in aid are available), the total public-school budget had soared to $2,564,866,871, of which 55% came from local taxes, 42% from State aid, and 3% from all other sources. Annual Educational Summary New York State 1964-65, Table 20, at 30 (1967). In 1966-67 the State educational budget rose to $3,241,000,000, of

which the State provided 45.6%. Univ. of State of N.Y., Bureau of Statistical Services, *Education Statistics Estimates* 1967-68, Table 7 (1967) [hereinafter *Educ. Statistics*]. The financing of education at nonpublic schools, both those which are under religious auspices and those which are not, comes almost entirely from the contributions of parents to the schools their children attend. In consequence —as the New York Court of Appeals pointed out (*supra*, p. 9)—children attending such schools in economically disadvantaged areas have suffered, and must suffer increasingly in the future, in comparison with public school children in the same or other areas, who have available the massive resources of both the State and the Federal governments.

Despite expansion of state and federal aid the nation is in crisis respecting the cost of educating its young. While school populations continue to rise, so do educational costs. In 1929-30 it cost approximately $135 to educate a child in the New York public schools. For 1967-68 the estimated figure is $1,082.* While inflation threatens a geometrical escalation of educational costs, the rising expectations regarding education's potential for the nation's future bring into view wholly new projected costs. While demands for improvement of American education become more intensive—particularly under the lengthening shadow of the problems faced by the nation's cities—legislators ponder how to maintain even the educational status quo.

Nowhere in the United States has the education crisis been on larger scale than in the State of New York, where

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* Univ. of State of N.Y., *Education Statistics New York State*, 12 (1968).

4,140,000 students are enrolled in public and private elementary and secondary schools. Since 1950 the state expenditures from all sources for elementary and secondary schools have risen from $616,184,000 to $3,241,000,000, or an increase of 450%. Projected increased expenditures show a rise to $4,245,000,000 in 1970 and $5,561,000,000 in 1975.* This financial crisis has particularly affected New York's major urban centers, which are population magnets drawing increasing numbers of people from elsewhere in the state and from out of state, and adding to the financial problems of both public and nonpublic schools.

A major element in New York's educational system is, and for many years has been, its nonpublic schools. In 1966, the year in which the Textbook Loan Act became effective, 891,146 New York children or 21.5% of the total state enrollment attended these schools.** The critically important part of the public burden carried by nonpublic (including religiously-affiliated) schools is especially significant in grades 7-12, the grades affected by the textbook loan program. In seven major urban centers of New York State, nonpublic secondary schools serve the following percentages of the total high school population: Albany 49.6%, Syracuse 33.7%, Buffalo 32.1%, Rochester 29.3%, New York City 26.8%, Utica 23.7%, Schenectady 19.5%.***

One of the major public needs which the Legislature sought to meet through the Act was to improve the qual-

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* Hogan, *Perceptives in Financing Public School Expenditures During the Period 1967-77* (1968).

** *Educ. Statistics,* Table I.

*** Enrollment data derived from Reimbursement Request Form (ST-1) submitted by individual school districts to Division of Educational Finance, 1967.

ity of education in the major urban centers of the State. The failure of major cities to provide adequately for textbook needs is indicated by the fact that before the Act in many of these cities the burden of textbook cost for *public* (as well as nonpublic) school pupils was borne by parents.*

New York City has provided a particularly disturbing illustration of the critical need for textbook aid to children in all schools. Concern for textbook availability and quality in that city has been reflected in the constant introduction during the years 1960-1966 of bills in the Legislature to provide New York City with special textbook aid.**

Textbooks have been described as "the good red blood that feeds the brain and strengthens the muscles of the educational process,***" and as the "universal" and "dominant" teaching tool.† There can be no doubt of the central role which textbooks play in education. President Johnson in his Education Message of 1965 stated:

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* While complete statistics are not available, it is known that prior to the 1965 amendment a substantial number of communities in New York were not supplying free books to public school pupils either by loan or grant. This was true in such major urban centers as Syracuse, Binghamton, Elmira, Rome, Utica, Troy, and Schenectady.

** Sen. No. 2135 (1960); Ass. No. 2794 (1960); Ass. No. 3620 (1961); Sen. No. 1291 (1962); Ass. No. 1511 (1962); Ass. No. 2886 (1963); Ass. No. 2048 (1964); Ass. No. 3380 (1965); Ass. No. 1061 (1966); Ass. No. 1068 (1966); Ass. No. 1311 (1966).

*** Lawrence G. Derthick, former United States Commissioner of Education, in a Speech Before the 1960 Meeting of the American Textbook Publishers Institute.

† Black, *Automation Still in Future,* Annual Education Review, New York Times, Jan. 12, 1968, p. 74, col. 2.

> "The explosion of knowledge and the rapid revision of curriculums in the schools has created new demands for school textbooks. The obsolete text can suffocate the learning process. Yet the cost of purchasing textbooks at increasing prices puts a major obstacle in the path of education—an obstacle that can and must be eliminated." 111 Cong. Rec. 499, 500.

While statewide textbook distribution rose by an estimated one-third between 1964-65 and 1965-66, bringing New York State from 21st to 7th place in the United States in per pupil expenditure for textbooks,* the effect of the Act has been especially strong in New York City. There, textbook expenditure for pupils in grades 7 through 12 rose from $3,050,000 in 1964-65 to $7,519,018 for 1966-67. The following figures strikingly bring home further evidence of the beneficial social impact of the Act in meeting the urban crisis:

TEXTBOOK EXPENDITURES 1966-67**

| | |
|---|---|
| Total for State | $19,213,342 |
| Total for 16 largest cities of State | 9,845,205 |
| Total for New York City | 7,519,018 |

As the cost of education and the number of school children have increased, the availability of state and federal aid for the benefit of children attending private schools

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* *Textbook Data for American Textbook Publishers Institute (1967)*, "Textbook Sales by State or Other Destination, Domestic Student Enrollment Per Capita."

** *State Aid for Elementary and Secondary Education in New York, 1966-1967.*

as well as for public school children has become a necessity of state and federal programs. Serious financial and administrative problems—to say nothing of legal and moral factors—make it highly undesirable for the Legislature to ignore the need for adequate education in the nonpublic as well as the public sector. It is clear that in New York—as elsewhere—the cost of attempting to incorporate students attending private schools into the public school system, as opposed to making available to them limited participation in some of the benefits of publicly-controlled programs for the welfare of all children, would be prohibitive. As Charles H. Silver, President of the Board of Education of the City of New York, testified before the General Subcommittee on Education of the House of Representatives:

> "It is quite obvious that the staggering problems and complexities involved in organizing, financing, and operating the largest school system in the world would indeed be greatly increased, if it were not for the private and church-related schools, which provide the education for such a large segment of elementary and high school youth in New York City. They are, and have been for generations, partners of the public schools in this great work of education. These nonpublic schools presently enroll approximately 450,000 boys and girls—a total slightly less than one-half of the number of 960,000 enrolled in public schools. Thus, one out of every three children in New York City of elementary and high school age attends a nonpublic school.

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If New York City were confronted with the situation whereby 450,000 additional children came into the public school system, this would entail a capital outlay of $1 billion for the construction of school buildings.

If New York City were responsible for the maintenance and operation costs of educating an additional 450,000 pupils, it would increase the cost to the city by approximately $200 million each year.

Aside from this staggering sum of money which would have to come from public taxes, the public school system would have the problem of obtaining the services of additional properly qualified teachers in the face of a present national shortage. A total of 18,000 new teachers would have to be employed. This represents approximately one-half of the total teachers presently employed in our New York City school system.

This staggering financial burden would be multiplied scores and scores of times, if local and State governments throughout the Nation had the responsibility of providing educational programs and facilities for all children now enrolled in nonpublic elementary and high schools. It is estimated that these institutions, with a total enrollment of 7 million pupils, save local and State governments an expenditure of more than $3 billion annually in operational and maintenance costs. An expenditure of approximately $16 billion would have to be made from public funds to provide buildings to house this student population." Hearings on H.R. 4970 Before the Gen'l Subcomm. on Educ. of the House Comm. on Educ. and Labor, 87th Cong., 1st Sess., 324-25 (1961).

Appellants are simply wrong in claiming that the cost to the public of limited educational benefits to private school students such as secular textbook loans would be the same as the cost of incorporating such students into the public school system (Br. 38). The cost of loans to nonpublic school pupils under the Textbook Loan program for 1967-68 is $5,093,000, or 19.7% of the total cost of the program, and .015% of the total state education budget. See *State Aid for Elementary and Secondary Education in New York, 1966-67*, 44.

**The Act Responds to the Crisis**

The Legislature's effort to respond in an adequate and practical manner to the education crisis in New York could scarcely be successful if it had excluded from help the one out of every five students in New York attending nonpublic schools. To relieve critical needs in education and yet to avoid transgressing constitutional prohibitions on public aid to religion, the Legislature has provided a carefully limited, publicly controlled program of loaning secular subject textbooks to qualified pupils in all schools.

The New York Legislature recognized many years ago that textbooks are a necessity of adequate secular education and in consequence provided for textbook aid to indigent children. In 1934 the Legislature enacted a statute (L. 1934, c. 638, now embodied in Educ. L. § 3209), which provided:

> "Public welfare officials, except as otherwise provided by law, shall furnish indigent children with suitable clothing, shoes, *books*, food and other necessaries to enable them to attend upon instruction as hereinbefore required by law." (emphasis added.)

The Attorney General of New York in 1935 rendered a formal opinion that the benefits of this statute must be extended to *all* children on public assistance in all schools, including parochial schools. Citing *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), he said

> "Compulsory education is the rule in this State. Such education may properly be afforded by parochial as well as by public institutions.
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> • • • • •
>
> It may also be noted that the parochial schools are in substance *public* in character also." (emphasis in original.) 1935 Report of Attorney General, 381.

Thus, since 1934 in New York State, indigent children attending both public and nonpublic schools (including religiously-affiliated schools) have been entitled to receive supplementary assistance grants in order to pay for textbooks as well as other special expenses such as lunches, bus fares, gym clothing, etc.*

The language of this statute, in bracketing textbooks with public welfare items such as "clothing, shoes, food and other necessaries", is not without significance.

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* The State Department of Welfare (now the Department of Social Services) has promulgated regulations to implement the 1934 Act. The regulations include "school expenses" as part of the personal budget of a family on relief. The regulations also add

> "(d) *Expenses incident to education.* (i) In addition to the allowance for school expenses included for school age children in the monthly allowance schedule, the cost of such special items as transportation, lunches, activity fees, *textbooks,* locker fees and gymnasium clothing shall be met for children regularly attending school." (emphasis added).

18 New York Codes, Rules and Regulations [N.Y.C.R.R.] 352.4 (b)(2), 352.5(d).

Before the passage of the 1965 Textbook Loan Act, the indigent-pupil provision of the 1934 Act just cited was the only mandatory requirement for the furnishing of textbooks in New York. In all other cases, the decision whether to provide free textbooks to public school children was left under Educ. L. § 703 to the voters of individual school districts. Contrary to the statement at page 13 of the amicus brief of the American Jewish Committee, et al., it had not been the "universal" practice in the pre-1965 period to provide free textbooks even to public school students.*

By the change effected through the Textbook Loan Act, New York abandoned the prior system of local option which had led to marked differences in treatment of children in different areas, and mandated free textbook loans to all pupils in grades 7 through 12 throughout the state, abolishing as to those children the indigence requirement of the 1934 Act. The inclusion of children in nonpublic (including religiously-affiliated) schools as beneficiaries of this general legislation, paralleled the enactment at the national level of the Elementary and Secondary Education Act of 1965, 79 Stat. 36 (1965) as amended, 80 Stat. 1199, 20 U.S.C. §§ 821-27 (Supp. II, 1965-66) which provides in Title II for the furnishing of free, publicly approved textbooks to pupils in both public and nonpublic schools. There, too, the secular legislative purpose was manifest. As the Report of the House Committee on Education and Labor stated:

> "The committee believes not only that there is widespread lack of library resources, textbooks, and other instructional materials in our elementary and secondary schools, but also is convinced of the serious con-

* See footnote *, *supra*, p. 18.

sequences to our educational programs in the event there is a failure to fill this need." H.R. Rep. No. 143, 89th Cong., 1st Sess. 11 (1965).

**The Act Provides Requisite Public Controls**

Through the Textbook Loan Act, the New York Legislature has attempted to advance the secular education of pupils at all schools by designing its program to meet the secular needs of all children rather than the particular interests of any school.

In the first place, students may not receive religious or sectarian books. The Act forbids the loan of textbooks unless they are "designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities." The New York Court of Appeals has construed the statute to provide for the loan of secular texts only (67a; 20 N.Y.2d at 117, 228 N.E.2d at 794-95, 281 N.Y.S.2d at 805), and this opinion is in accord with prior administrative interpretation. (See Opinion of Counsel quoted at p. 4, *supra*.) The Act is further limited in that it excludes reference books, novels and other fiction, being centered upon specific secular educational goals. (Op. of Counsel No. 181, ¶4; Supplement B, p. S-6).

In the second place, the loans are governed by explicit public controls. Ownership remains in the school district and is to be "indicated in or on each book by labels or other appropriate methods of identification." (Op. of Counsel No. 181, ¶16a; Supplement B, p. S-14) By the express and clear language of the Act, the program is a "loan" program, not a "gift" program. "All books remain the property of the school district *and must be treated as*

*such.*" (¶16a; Supplement B, p. S-14) Administrative action to convert the loans into grants would be in violation of the Act. The character of the loan program is underscored by the power of school boards to make rules and regulations for reimbursement to the district by students in public and private schools for damage, loss or destruction of loaned textbooks. (§ 701(3) of the statute; Op. of Counsel No. 181, ¶7; Supplement B, p. S-7. See also Supplement C, pp. S 16-19 for sample of school district regulations and textbook application form.)

Furthermore, the books are loaned not to schools but to the individual students. Each student must individually request the books loaned to him:

> "Under the statute, both the power and the duty to purchase and loan textbooks depend upon individual requests to the school board for such textbooks." (Op. of Counsel No. 181, ¶12; Supplement B, p. S-10)

Additional elements of the textbook loan program show that its purpose is to benefit individual pupils rather than schools. Books are furnished by the board of education for the district where the student resides, not where the student attends school (§ 701(3); Op. of Counsel No. 181, ¶8b; Supplement B, p. S-8). With respect to private school pupils, loans may only be made to those children enrolled in schools "which comply with the provisions of the Compulsory Education Law, i.e., which provide at least substantially equivalent educational services and facilities . . . as the public schools of the district of location provide." (Op. of Counsel No. 181, ¶8a; Supplement B, pp. S 7-8)

Wholly ignoring the obvious enhancement of the secular education of all children at public and private schools and

the concurrent benefit to the public welfare, appellants argue that the loan to students is "fictional" and that ownership of the books is really in the schools. This claim is totally inconsistent with the statutory requirements and administrative regulations outlined above, which demonstrate that the purpose of the Act and its practical effect are to provide secular textbooks for students at all schools, and not to provide books in aid of any school, religiously affiliated or otherwise.

## Public Recognition and Regulation of Nonpublic Education in New York

### *Organization and jurisdiction of the New York Education Department*

The organization of the educational system in New York State is in many respects unique. Unlike many States where the public educational system is headed by an appointed or elected Commissioner of Education with limited powers, in New York all education, both public and private, is subject to the jurisdiction and control of the Regents of the University of the State of New York. The Regents are a corporate body composed of 15 members elected for staggered terms by joint ballot of the Legislature (Educ. L. § 202).

(i) Under New York law (Const. Art. XI, § 2; Educ. L. § 101) the Regents are the head of the *State Education Department.* Their administrative arm is the Commissioner of Education, defendant in this case. The Commissioner and Deputy Commissioner are appointed and removable by the Regents (Educ. L. § 101). All other officers and employees of the Education Department are appointed

and removable by the Commissioner subject to the approval of the Regents (Educ. L. §§ 102, 104, 105).

(ii) Under Educ. L. § 202 the Regents are also the governing body of *"The University of the State of New York."* • This is not a university in any conventional sense. It has neither a campus, a faculty nor a student body of its own. Its composition is defined in Educ. L. § 214 entitled "Institutions in the University":

> "The institutions of the university [i.e. 'The University of the State of New York'; cf. definition in Educ. L. § 2(3)] shall include all secondary and higher educational institutions which are now or may hereafter be incorporated in this state, and such other libraries, museums, institutions, schools, organizations and agencies for education as may be admitted to or incorporated by the university. The regents may exclude from such membership any institution failing to comply with law or with any rule of the university."

Under Educ. L. § 207 the Regents are granted broad "legislative functions" in the entire field of education, both public and private. The only subject excluded from their control under § 207 is "the entire course of religious, doc-

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• The "University of the State of New York" in this form has been in existence under the Regents since 1784. Despite the similarity of name, it must not be confused with the "State University of New York", which is an entirely separate institution founded in 1948, and which is a conventional publicly-maintained university, consisting of a number of colleges and graduate schools scattered throughout the State outside New York City (cf. Educ. L. § 350 et seq.). The comparable public institution within New York City is the City University of New York (Educ. L. § 6202 (1)). The State University and the City University have their own boards of trustees, and as parts of "The University of the State of New York" are under the over-all supervision of the Regents.

trinal or theological instruction" in seminaries for the training of the clergy.

The effect of this provision is to include within "The University of the State of New York" all public and private high schools and colleges within the State which meet the Regents' standards.

In addition to their general powers under § 207 the Regents have these further specific powers and duties:

(i) To visit, inspect, and require reports from, all institutions of education, public and private, within the State (§ 215).

(ii) To charter, on such terms as they may prescribe, all institutions in the field of education, including not only schools and colleges, but also libraries, museums, teachers' associations, etc. (§ 216).

(iii) To suspend or revoke the charter of any such institution, public or private (§ 215, 216, 219).

Under § 218 their consent is required before any institution, public or private, can set up a department of education or give degrees.

The net effect of all these sections is to place the control and supervision of all educational institutions, public and private, under the jurisdiction of the Regents and their administrative arm, the Commissioner of Education.

***Extent of public regulation and recognition of nonpublic education***

Within the statutory framework thus outlined, New York has long recognized the public importance, and the necessity of public supervision, of adequate secular education

at private schools within the State. Nonpublic schools, including both those which are religiously affiliated and those which are not, are recognized by law as part of the educational system of the State. As such, they are extensively regulated by the public authorities in such matters as attendance, curriculum, inspection, and accreditation. Only those schools which meet the requirements laid down by law and by the regulations of the State Education Department are recognized as complying with the compulsory education law. This is in full accordance with the two basic rules laid down by this Court in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925):

> (i) "No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." (p. 534)
>
> (ii) ". . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." (p. 535)

Attendance at private schools which do not meet the State's requirements will not be recognized as compliance with the compulsory education law; and a parent who insists upon sending his child only* to such an unrecognized

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* Provided the requirements of the compulsory education law are being met, a parent can of course send his child anywhere for whatever additional schooling he desires.

school can be prosecuted for non-compliance with that law. The basic test in each case is whether the instruction given outside the public school is, in the words of Educ. L. § 3204(2):

> "at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides."

This statute has been interpreted and enforced, and the basic test of substantial equivalency applied, in several reported cases. Instruction was held "substantially equivalent" in *People* v. *Turner,* 277 A.D. 317, 98 N.Y.S.2d 886 (4th Dept. 1950); *Matter of Myers,* 203 Misc. 549, 552, 119 N.Y.S.2d 98, 101 (Domestic Relations Ct., N.Y.Co. 1953); *Van Allen* v. *McCleary,* 27 Misc. 2d 81, 211 N.Y.S. 2d 501 (Sup. Ct., Nassau Co. 1961). Instruction was held *not* "substantially equivalent" in *People* v. *Donner,* 199 Misc. 643, 99 N.Y.S.2d 830 (Domestic Relations Ct., Kings Co. 1950), *aff'd,* 278 A.D. 705, 103 N.Y.S.2d 757 (2d Dept. 1951), *aff'd,* 302 N.Y. 857, 100 N.E.2d 48 (1951), *app. dism. per curiam,* 342 U.S. 884 (1951); *Matter of Weberman,* 198 Misc. 1055, 100 N.Y.S.2d 60 (Sup.Ct., Kings Co. 1950), *aff'd,* 278 A.D. 656, 102 N.Y.S.2d 418 (2d Dept. 1951), *aff'd,* 302 N.Y. 855, 100 N.E.2d 47 (1951), *app. dism. per curiam,* 342 U.S. 884 (1951); *In re Conlin,* 130 N.Y.S. 2d 811 (Children's Ct., Nassau Co. 1954).

The following are some of the principal respects in which nonpublic schools are regulated under New York law:

**(i) *As to attendance***

Educ. L. § 3205(1)(a):

> "In each school district of the state each minor from seven to sixteen years of age shall attend upon full time day instruction."

There is an exception for minors who have already completed a full course at high school (§ 3205(2)(a)). Other special provisions cover part-time attendance and evening sessions (§§ 3205(2)(b), 3206 and 3207). Under § 3205(3) certain local boards of education are empowered to raise the required age limit from sixteen to seventeen.

Educ. L. § 3210(2)(a) provides that minors who attend upon instruction "elsewhere than at a public school" must attend for at least as many hours and within the hours specified for public school attendance. (Cf. Educ. L. § 3204(4))

Educ. L. § 3210(2)(c) provides that holidays and vacations for nonpublic schools "shall not exceed in total amount and number those allowed by the public schools". This is subject to an exception provided by § 3210(2)(d) permitting attendance for a shorter school day or for a shorter school year

> "provided, in accordance with the regulations of the state education department, the instruction he receives has been approved by the school authorities as being substantially equivalent in amount and quality to that required by the provisions of part one of this article."

Educ. L. § 3211 requires the teacher of every minor pupil, no matter what school he attends, to keep records

of attendance and absence and to produce such records upon demand by any duly authorized representative of the public school authorities. The principal of every school which any minor attends must give prompt notification in writing to the local public school authorities, with full details, of the discharge or transfer of any minor from attendance at his school.

**(ii) *As to curriculum***

The basic curriculum requirements applicable to both public and nonpublic schools are laid down in Educ. L. § 3204.

§ 3204(1) provides:

> "1. Place of instruction. A minor required to attend upon instruction by the provisions of part one of this article may attend at a public school *or elsewhere.* The requirements of this section shall apply to such a minor, irrespective of the place of instruction." (emphasis added)

§ 3204(2) provides:

> "2. Quality and language of instruction; text-books. Instruction may be given only by a competent teacher. In the teaching of the subjects of instruction prescribed by this section, English shall be the language of instruction, and text-books used shall be written in English. *Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides.*" (emphasis added)

§ 3204(3)(a)(1) lays down the basic curriculum for grade schools and explicitly requires that pupils receive instruction in various secular subjects as follows:

> "3. Courses of study. a. (1) The course of study for the first eight years of full time public day schools shall provide for the instruction in at least the twelve common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training, the history of New York State and science."

§ 3204(3)(a)(2) provides for high schools:

> "(2) The courses of study and of specialized training beyond the first eight years of full time public day schools shall provide for instruction in at least the English language and its use, in civics, hygiene, physical training, and American history including the principles of government proclaimed in the Declaration of Independence and established by the constitution of the United States."

While the two subsections just quoted by their terms refer to "public day schools", they must be read, and have been interpreted by the courts, as applicable to private schools as well, under the "substantially equivalent" requirement of § 3204(2). *People* v. *Donner; Matter of Weberman,* both cited *supra* p. 31.

§ 3204(3)(2)(e) provides:

> "The state education department shall have power to alter the subjects of instruction as prescribed in this section."

Beside the basic curricular requirements prescribed by §3204, other sections of the Education Law contain further requirements which are specifically made applicable to both private and public schools. In some instances, the statute adds that if any private school fails to furnish the prescribed instruction, then

> "attendance upon instruction in such school shall not be deemed substantially equivalent to instruction given to pupils of like age in the public schools in the city or district in which such pupils reside."

These additional requirements include:

(i) "Courses of instruction in patriotism and citizenship" (§801(1))

(ii) Courses in the "history, meaning, significance and effect" of the Declaration of Independence and the Constitutions of the United States and New York (§801(2))

(iii) Physical training for all pupils over eight years old (§803)

(iv) Instruction in highway safety and traffic regulation (§806)

(v) Fire drills (§807) and instruction in fire prevention (§808).

### (iii) *As to accreditation*

As noted above (pp. 27-29) the Regents have broad powers as to the chartering, visitation, supervision and accreditation of all institutions of learning, both public and private. Specifically as to accreditation, the following additional provisions should be noted:

Under Educ. L. § 208 the Regents are given power to award Regents' diplomas and to prescribe Regents' examinations.

Under Educ. L. § 209 the Regents are *required* to establish "in the secondary institutions of the university [i.e. all public and private high schools], examinations in studies furnishing a suitable standard of graduation therefrom *and of admission to colleges . . .*". Accordingly, in addition to compliance with the curriculum requirements above outlined, all secondary schools in New York must be "registered" or "admitted" with the Regents, if they are to enjoy the benefits of full participation in The University of the State of New York. These benefits include (a) the right to give Regents' examinations, (b) the right to issue Regents' diplomas, (c) full recognition of its credits and diploma at any other school or college within "The University of the State of New York", public or private.

(i) *Registration.* The Regents have issued rules governing "registration", or "admission". 8 N.Y.C.R.R. 3.30, 3.31. (See Supplement D, pp. S20-21 for text.) "Registration" is the term applied by the Regents to the act under which secondary schools, both public and private, become subjected to supervision and inspection on a regular basis. It is the equivalent of the more widely known term, "accreditation". The Commissioner of Education has issued regulations detailing the procedure and requirements for registration of any secondary school. It is important to note the various standards which are imposed, including courses of study, sequence, hours and days, teacher qualifications, teacher work-load (class size), location, construction and equipment (see Supplement E, pp. S22-25 for text).

(ii) *Diplomas.* A registered secondary school—public or private—is granted the privilege of administering Regents' examinations for the issuing of a *state* high school diploma upon proof that the student has "satisfactorily passed examinations in the *subjects prescribed* for the completion of an *approved* four year course". (See Supplement F, pp. S26-29 for copy of diploma and form of State record sheet reciting the subjects covered.) It is to be noted that the legal issuer of the diploma, pursuant to Educ. L. § 209, is "the Regents" (*i.e.*, the public authority). The diploma is signed by the Commissioner of Education over the seal of "The University of the State of New York".

(iii) *Secular significance of diploma.* In common with the diploma issued to a graduate of a public high school, the identical diploma issued to the graduate of a religiously-affiliated high school provides the evidence of educational qualification for numerous public employments. Therefore, whatever else the graduate of a religiously-affiliated high school may have received in the years of his attendance, he has also received secular education so complete in the eye of the State as to provide him with the full measure of educational qualification established by the State as the standard for the agents who are to achieve its goals in a variety of public employments. Such education in other words, serves a public purpose. The language of the diploma (taken in conjunction with the fact that this same diploma has been issued to millions of graduates of religiously-affiliated and other nonpublic high schools in New York over the past years) constitutes a most exact recognition of the intervenor-appellees' position, that purely secular public purposes

may be and are being fulfilled, under public supervision and regulation, through attendance at religiously-affiliated educational institutions.

## II.

## The Act Fulfills a Secular Legislative Purpose and Has a Primary Effect That Neither Advances Nor Inhibits Religion

### The Act Fulfills a Secular Legislative Purpose

From the foregoing it is clear that the Textbook Loan Act fulfills a secular legislative purpose:

1. The Act answers critical public, or secular, needs in education in the face of an indefinitely expanding educational crisis.

2. The Act provides public controls assuring the achieving of public, or secular, goals in education.

The constitutional significance of showing that legislation attacked on Establishment grounds fulfills in fact a secular legislative purpose is demonstrated by three decisions of this Court, all in the general field of education—*Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370 (1930), *Everson* v. *Board of Education,* 330 U.S. 1 (1947), and *School District of Abington Township* v. *Schempp,* 374 U.S. 203 (1963).

The decisions in these three cases are entirely consistent with each other and interrelated. Each of them illuminates one or more aspects of the issue presented in the case at bar; and taken together they supply a foundation upon which we submit the decision in this case can rest. We shall deal with them chronologically.

(a) *Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930).*

It is true, of course, that *Cochran* raised no issue under the First Amendment. We do not claim that it did. Nevertheless, this Court in *Cochran* unanimously and squarely decided that a statute substantially similar to the New York Textbook Loan Act fulfilled a *secular legislative purpose*. *Cochran* involved (as here) an attack on State legislation permitting the use of public funds to provide secular textbooks to pupils in all schools, public and private, including private schools with a religious affiliation. In *Cochran* (as here) the plaintiffs averred that the purpose of the textbook program was:

> "... to aid private, religious, sectarian, and other schools not embraced in the public educational system of the State by furnishing text-books free to the children attending such private schools." (281 U.S. at 374).

This Court, while not faced with the question whether an establishment of religion was created by the Louisiana legislation, was faced with an intimately related problem: was not the legislation an unconstitutional financing of private (including religious) institutions? The Court, unanimously, per Chief Justice Hughes, held that it was not:

> "The schools ... are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries ... The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private

concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded." *Id.* at 375.

The *Cochran* decision, never overruled or qualified in subsequent decisions of this Court,* has significance for the instant case in two respects. First, the providing, by the public, of secular-subject textbooks to children in parochial schools *is not, within the meaning of the Constitution, aid to the institution.*

Second, the Court held that *a public purpose was served.* While the plaintiffs in *Cochran* did not make an express claim for relief under the Establishment Clause, the Court expressly dealt with their claim in terms of the religiously-affiliated character of the schools involved. The Court's conclusion that the legislation was justified as achieving a *public* purpose therefore becomes significant, not because the Court did not apply the Establishment Clause *but because the Court, consciously and expressly dealing with religiously-affiliated institutions,* nevertheless concluded that the program achieved a *public* (i.e. a *secular*) purpose.

Appellants nevertheless contend that *Cochran* is irrelevant to the determination of the present case, because in *Cochran* the Establishment issue was not before the Court. We submit, however, that the double holding in *Cochran* of (i) a secular legislative purpose and (ii) no institutional benefit to religiously-affiliated schools, is most relevant

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* The *Cochran* case has been cited with approval in *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 518 (1937) (Stone, J., opinion of the Court); *Everson* v. *Board of Education*, 330 U.S. 1, 7 (1947) (Black, J., opinion of the Court); *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 248 (1963) (Brennan, J., concurring opinion).

here, and is entirely in line with the principles later developed and enunciated in *Everson* and *Schempp*.

(b) *Everson* v. *Board of Education, 330 U.S. 1 (1947)*

In *Everson* the Establishment issue was squarely presented. So also was presented again the Due Process issue dealt with in *Cochran*. In *Everson* plaintiffs urged that a New Jersey statute providing public support of transportation to parochial school pupils violated both constitutional provisions. The Court, considering the Establishment question, laid down the classic exposition of church-state separation to which it has unswervingly adhered. With that expression—set forth in appellants' brief at page 10—intervenor-appellees are in complete accord.

The Court in *Everson* held the challenged program constitutional under both the Establishment and Due Process Clauses. In discussing the due process argument raised in the case, the Court made express mention of *Cochran*, with its textbook program, *and at once bracketed this with bus ride programs* (330 U.S. at 7), which it called "public welfare legislation." 330 U.S. at 16. In its discussion of the due process issue in the case, the Court carefully weighed whether that program was truly in the public interest. In such weighing, the Court, though conscious that First Amendment liberties were raised in the case, paid careful heed to the determinations of the legislature and the highest court of New Jersey that the bus statute served a public purpose, and pointedly noted that "[c]hanging local conditions create new local problems which may lead a state's people . . . to believe that laws authorizing new types of public services are necessary to promote the general well-being of the people." *Id.* at 6-7. The Court not only held that the

bus statute served a public purpose, but did so with the following broad statement identifying the transportation program as an aid to secular education:

> "It is much too late to argue that legislation intended to facilitate the opportunity of children *to get a secular education* serves no public purpose." *Id.* at 7. (emphasis added).

Again emphasizing the important public purpose achieved by the New Jersey program, the Court went on to conclude that the program did not violate the Establishment Clause. As to this latter point, see discussion *infra*, pp. 44, 47-49.

From the "public purpose" portion of the *Everson* decision, the following conclusions directly apply to the instant case:

1. *Everson* recognizes educational need and lends strong support to the view that legislation aiding "secular education" fulfills a public purpose.

2. *Everson*, by necessary implication, holds that "secular education" is afforded in religiously-affiliated schools.

3. *Everson* recognizes that states, for the well-being of their people in the field of education, may continue to evolve "new types of public services" (of which the busing statute was one). The New York Legislature, by the Textbook Loan Act, has evolved a new type of educational service for what it demonstrably believed to be the well-being of the people of New York. With this conclusion the Court of Appeals agreed. As has been shown, the support of secular education, under extensive public controls, is amply achieved by the Act.

(c) *School District of Abington Township* v. *Schempp, 374 U.S. 203 (1963).*

In this case the Court discussed the history of its treatment of legislation which combined public ("secular") purposes and possible effects of a religious nature. Drawing upon the principles it had evolved in past cases, it unified them in the following test:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson* v. *Board of Education, supra; McGowan* v. *Maryland, supra,* at 442." (374 U.S. at 222)

This test is not simplistic. It calls for scrutiny in two directions: (i) respecting the actuality and degree of the secular, or public-interest, purpose of the enactment, (ii) respecting the impact of the program in advancing or inhibiting religion. Appellants ignore the public purpose served by the statute. But the Court, in *Schempp,* made it clear that its employment of the term, "secular legislative purpose", not only was deliberate but was intended to constitute an important factor in judging the constitutional issue.

The Court, in *Schempp,* cited both *Everson* and *McGowan* v. *Maryland,* 366 U.S. 420, 442 (1961), at the conclusion of its statement of the aforementioned test. In

*Everson* (preceded by consistent expressions in *Bradfield, Quick Bear* and *Cochran*),* the Court gave great weight to the facts demonstrating "secular legislative purpose" in legislation attacked on Establishment grounds. Both under the "due process" portion of the *Everson* opinion, and also under its exhaustive examination of Establishment, the Court pointed to and discussed the facts of the questioned bus statute as welfare, or secular-purpose, legislation, concluding that the statute was true "public welfare" legislation as opposed to "religious" legislation. It is in the light of *Everson's* consideration of the secular, public, or welfare aspect of legislation, carried forward into the first part of the *Schempp* test, that intervenor-appellees believe must in part be judged. So seen, it plainly meets the terms of the test because it provides to all students, irrespective of the schools they attend, the tools necessary to obtain a proper secular education as required by New York law and considered by the New York Legislature to be essential to the future well-being of the State and its citizens.

Further confirmation of the importance of the "secular legislative purpose" term of the *Schempp* test is found in the Court's reference in *Schempp* (374 U.S. at 222) to the statement in *McGowan* (366 U.S. at 442) that "the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions". It is true that *McGowan* was a case involving regulation of conduct, not public spending. Yet the principle underlying *McGowan* is close to that of *Everson*. As the Court of Appeals of Maryland, in a case involving tax exemption of churches, recently stated:

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* *Bradfield* v. *Roberts*, 175 U.S. 291 (1899); *Quick Bear* v. *Leupp*, 210 U.S. 50 (1908); *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370 (1930).

> "As McGowan makes clear, even though the exemption had an unmistakably religious origin, if the present purpose and effect of the exemption is primarily secular, and if those purposes could not reasonably be deemed achievable without an incidental benefit to religious organizations, the 'establishment' clause is not violated." *Murray* v. *Comptroller,* 241 Md. 383, 401, 216 A.2d 897, 907 (1966), *cert. denied,* 385 U.S. 816 (1966).

Unlike the Sunday Closing Laws in *McGowan,* no claim is made here that the New York Textbook Loan Act had a "religious origin"; and the contrary clearly appears from the statement of policy in the preamble to the Act. See p. 5, *supra.*

The allusion, in the *Murray* decision, to "purposes . . . not reasonably achievable without an incidental benefit to religious organization", is significant in consideration of the "secular purpose" argument. The implication is that the Establishment Clause forbids "the use of essentially religious means to serve governmental ends where secular means would suffice". *Schempp, supra,* 374 U.S. at 231 (Brennan, J., concurring). *Torcaso* v. *Watkins,* 367 U.S. 488 (1961), cited by appellants (Br. 11, 23, 27) bears this point out strikingly (*i.e.,* the use of a religious test oath to guarantee responsible service from a notary public). But New York's program here attacked is not merely remote from such misuses of civil authority, but its very opposite. The Textbook Loan Act uses secular means to achieve secular ends in precisely and unavoidably the same sense

that many other public programs (relating in some manner to religious agencies) achieve secular ends.*

If the Act in fact aids the secular education of all children, including those in religiously-affiliated schools, the only "alternative means" to those state-controlled and state-administered means by which this general public benefit is accorded them would be to move children in religiously-affiliated schools *en bloc* into non-religiously affiliated schools—an alternative as prejudicial to their liberty as it would be catastrophic to the public schools and the solvency of the State.

**The Act Has No Primary Effect That Advances Religion**

The test brought forward from *Everson* and stated in *Schempp* not only calls for a demonstration of secular legislative purpose but also mandates that there must be no primary effect which advances or inhibits religion. Appellants thus misstate our position when they ascribe to us the view "that *Everson* is to be read as saying that any tax measure is valid if the funds are appropriated for a public purpose . . ." (Br. 13). We hold no such view.

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* *E.g.*, G.I. Bill of Rights (Veterans Readjustment Assistance Act of 1952), 38 U.S.C. §§ 1601-69 (Supp. II 1965-66) and the National Defense Education Act of 1958, 72 Stat. 1581, as amended 79 Stat. 1251 (1965), 80 Stat. 1245 (1966), 20 U.S.C. 401-592 (Supp. II 1965-66), which have provided tuition payments and, in the case of the G.I. Bill, payments for textbooks (58 Stat. 289 (1944)) for students attending nonsecular as well as secular universities; National School Lunch Act, 60 Stat. 230 (1946), 42 U.S.C. §§ 1751-60 (1964); Elementary and Secondary Education Act of 1965, 79 Stat. 29, 20 U.S.C. §§ 236-44 (Supp. II 1965-66), New York State Scholar Incentive Program and New York State Regents Scholarship Program, New York Education Law §§ 601, 601-a (McKinney Supp. 1967) (provision of funds for students attending universities under religious auspices), New York Education Law § 3713 (McKinney 1953) (provision of benefits under Federal school lunch program administered by the State to students in nonsecular schools).

The practices struck down in *Schempp, Engel* v. *Vitale*, 370 U.S. 421 (1962), and *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948) — all of them involving distinctively religious exercises in the public schools—afford obvious examples of programs having a primary effect of advancing religion. Any "secular" effect or benefit claimed in defense of them was solely such effect or benefit as religion itself is deemed to confer. So, too, with the imposed oath-taking in *Torcaso*. These are some examples of activities which the Court intended to be encompassed by the concept "primary effect advancing religion".

While it is also clear that the aforementioned activities do not exhaust the category of activities which may be judged to have a primary effect of advancing religion, they are the only decisions in which this Court has held that such a primary religious effect existed. In the other Establishment cases which it has considered—the two cases which it cited at the conclusion of the statement of its test in *Schempp*—it found that there was no such effect. These cases, *Everson* and *McGowan*, are instructive as to the meaning of "primary effect advancing religion."

In the instant case, as in *Everson*, "the benefits of public welfare legislation" are involved. In each case all school children generally are the beneficiaries of the legislation, and in each case the schools they attend meet "the secular educational requirements which the state has power to impose." The appellants argue (as did the appellants in *Everson*) that the welfare program in question must be enjoined only as to those children attending religiously-affiliated schools. In each case the public program *directly* aids the education of the child in such school. In *Everson*, the Court said that by the bus program "children are helped to get

to church schools" and that the program might, in fact, be the decisive factor in enabling a child to get to such a school:

> "There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares . . . when transportation to a public school would have been paid for by the State." 330 U.S. at 17.

But the Court, in *Everson*, distinctly held that the program there attacked (a program which it described as *"intended to facilitate the opportunity of children to get a secular education"*) did not constitute aid to religion, did not involve the levying of any tax to "support" religious activities or institutions, and resulted in not the *"slightest breach"* of the wall between church and state.

Indeed, to the contrary, the Court posted warning signs that absolutist zeal to press the Establishment Clause to the limits of doctrinaire logic would result in injury to Free Exercise liberties. It warned that a State may not exclude anyone, "because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Id.* at 16. It said that care must be exercised, "in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief." *Ibid.* It even inferred that denial of the social benefit attacked in *Everson* might constitute a use of the state power to "handicap religions". *Id.* at 18.

Understandably, appellants in their Jurisdictional Statement urged that *Everson* be regarded as lacking vitality—

a position which they have now abandoned. This Court has, over the intervening years, given steadfast recognition not only to the *Everson* definition of "establishment", but also to its holding and entire rationale. See *McGowan* v. *Maryland,* 366 U.S. 420, 443-44 (1961); *School District of Abington Township* v. *Schempp,* 374 U.S. 203, 222 (1963); *Sherbert* v. *Verner,* 374 U.S. 398, 410 (1963). See also *Rhoades* v. *School District of Abington Township,* 389 U.S. 11 (1967).

Appellants, in skirting the *Schempp* test, say that it "contemplates that a law may have more than one primary effect." (Br. 26). If their contention were correct, the Court's use of the adjective "primary" would have been superfluous. But the use of the word "primary" cannot be presumed to have been unintentional or careless. While the Court's citation to *Everson* and *McGowan* provides the best explanation of what it meant by "primary" effect, the predominant dictionary definition also cuts the ground from under the notion of multiple "primary effects" and makes clear that the common meaning is: *"first in importance", "chief", "principal".**

Appellants' speculation over the "likely" meaning of the test obscures the importance of the phrase, "neither advances nor inhibits". Thus there is required to be shown, not merely some indirect relationship to religion, but an effect having the marked positive or negative character of *advancing or inhibiting* religion.

In view of the facts of this case, of the holdings in the prior relevant cases, and the clear prescription of this

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* American College Dictionary, p. 961 (1967); Webster's New International Dictionary (2nd ed.), p. 1963.

Court as to "no primary effect which advances religion", the Act, demonstrably accomplishing a secular purpose, constitutes no establishment of religion.

**Appellants' Other Arguments Relating to the "Religious" Effect of the Act Are Unsound**

a. *"By furnishing textbooks to sectarian schools, the state enables such schools to purchase religious texts with the money thus saved."* (Br. 7, 17). There is no evidence in this case that parochial schools previously bore the expense of furnishing textbooks to their students. The intervenor parents in this case all paid for their children's textbooks (14a); and the practice in New York, prior to the adoption of the Textbook Loan Act, was to require parents of public-school pupils to pay for their children's textbooks except in communities which had availed themselves of the local option under former Section 701 to furnish textbooks at public expense (*cf.* discussion at pp. 18, 23-24 *supra*). Thus, there is no basis in this record for any finding that the statute effects financial savings to schools enabling them to release funds for any religious purposes.

b. *" . . . the parochial school may order any book designated by any school board. This is an open invitation for any church whose adherents dominate any one of the 800 school districts in New York to see to it that the board of this captive district designates the books which reflect the church's point of view."* (Br. 36). Appellants then escalate this imaginary situation into veritable "holy wars" in which "sect will be pitted against sect". To this there are several answers:

(i) The law forbids *any* school board to issue *any* textbook reflecting any church's particular point of view. See pp. 4, 25, *supra.*

(ii) Appellants' argument is pure speculation as to future events, with nothing in the record to suggest that such events are likely to happen. If any local school board were to attempt any such violation of the law and the applicable regulations, the New York courts and the New York Commissioner of Education would be quick to stop any such hypothetical administrative abuse.* Appellants' *in terrorem* argument misconceives the task of constitutional adjudication which is "the ability and willingness to distinguish between real threat and mere shadow." See *School District of Abington Township* v. *Schempp, supra* at 308 (Goldberg, J., concurring).

(iii) If this branch of appellants' argument were valid, the basic assumptions underlying the entire public school system would be open to serious question. If, as appellants

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* The strictness with which the Commissioner of Education has enforced the First Amendment against local public school authorities is illustrated by several formal decisions of the Commissioner. Thus, even before this Court's 1948 decision in *McCollum,* the Commissioner had banned released-time religious instruction in public school buildings. *Matter of McLennan,* 65 N.Y. State Dept. Reports 56 (1943); *Matter of Cromwell,* 66 N.Y. State Dept. Reports 8 (1945). See also *Matter of Belman,* 78 N.Y. State Dept. Reports 10 (1957). In *Matter of Rubinstein,* 2 Ed. Dept. Rep. 299 (1962) the Commissioner forbade the recitation of the last stanza of the Star Spangled Banner under circumstances indicating that it was being used as a prayer and not as a patriotic ceremony.

The broad scope of the control over local school authorities exercised by the Commissioner in all fields can best be seen by scanning the "Education" section in any volume of the New York State Department Reports. Thus in Volume 78, one of those cited above, the Commissioner, during the year 1958, rendered formal decisions on over 500 appeals against actions taken by local school boards in a wide variety of matters.

also assert, no adequate identification of secular versus nonsecular material can be made (Br. 17) and if this alleged fact will produce a struggle among religious groups for use of materials reflecting their various points of view, then, by the reasoning of appellants, the danger already exists, wholly apart from the present statute. Children in the public schools come from all faiths. On appellants' theory, there is nothing to prevent their parents—regardless of the present statute—from engaging in a power struggle over the choice of textbooks for public-school use only, with the result that the public schools will inevitably be subverted to the service of religion (or non-religion) wherever one group happens to predominate. We submit that such reasoning is compelled by appellants' analysis, and we further submit that it has no basis in experience and clearly no basis in the record.

c. *"There is no such thing as secular education in a sectarian elementary or secondary school."* (Br. 16, 17). This charge, finding no support in the record, is propped up by the equally unevidenced assertion that the textbooks "are used in connection with the teaching of religious tenets and faiths" (*id.* at 7, 17). The charge is answered by the terms of the Act, by the public policy of New York, and by the nature of the modern educational process.

The Act provides only secular textbooks, approved by public authority for use in the New York public schools. The titles of these books are a matter of public record; and appellants make no attack upon any particular book or books. Instead, appellants make the general assertion that "there is no reliable standard by which secular and religious textbooks can be distinguished from each other".

(Br. 15) Carried to its logical conclusion, this would mean that all school textbooks may be inherently dangerous under the First Amendment. Appellants' argument would apply equally to books loaned to public school pupils and to parochial school pupils. But the Act's binding obligation upon all school districts is clear: only nonreligious textbooks may legally be furnished to children in *any* school.

Appellants' argument that the Act can only contribute to religious instruction in parochial schools is squarely contradicted by the fact that the Act actually has the opposite effect. Furnishing students in these schools with secular textbooks results in a replacement of any religiously-oriented texts on the same subjects which such schools are alleged—without record foundation—to have been employing. The net effect of the program, therefore, would appear to be to increase the secular content of instruction in these schools.

The public policy of New York is directly challenged by appellants' accusation that "there is no such thing as secular education" in New York's religiously-affiliated schools. As has been amply demonstrated (*supra,* pp. 27-38), that policy both recognizes and regulates the secular role of New York's religiously-affiliated schools, through the compulsory education law, the requirements of "substantial equivalency" to public schools in instruction, competency of teachers and secular-subject curriculum, and respecting accreditation, diploma issuance and other matters. Appellants' attack upon this public policy constitutes no basis whatever for denying to children enrolled in such schools the loan, for use there and at home, of secular textbooks.

Finally, appellants are answered by the realities of the educational process in all New York education in the 1960's. Parents who send their children to religiously-affiliated schools expect and demand that the latter will receive religious instruction there as a part of a general education. But neither this parental motivation, nor the religious commitment of those who operate these schools,* warrants the conclusion that the free loan of secular textbooks to children in these schools amounts, in the constitutional sense, to support of religion. Apart from formal courses in religion and from specific religious exercises (to which the secular textbooks furnished under the Act are obviously inapplicable), contemporary demands on religiously-affiliated schools relating to class time requirements and notoriously mounting pressures for academic excellence do not permit such schools to be eccentric schools of religiosity as they are caricatured by appellants and their supporting amici. Today's parents of parochial school children demand that that schooling be geared, without quality differentiation, to general educational standards. The influence of standardized tests (*e.g.*, New York Regents, College Entrance Board examinations) is per-

* With particular reference to those nonpublic schools which are under Catholic auspices, the general observation may be made that they are in a process of rapid transformation. This process is characterized by (a) the trend toward democratically elected lay school boards, (b) the increase of lay teachers (nationally now about 50%), (c) the pervasive impact of the Second Vatican Council, with its teachings on religious liberty, ecumenism, human rights and dignity. Appellants cite Mr. Justice Jackson's quotation, in 1947, from Woywod's 1940 commentary on the Code of Canon Law (Br. 15). The Code is presently being rewritten by a Commission for Revision of the Code of Canon Law appointed by Pope John XXIII March 28, 1963 (see NC News Service, April 25, 1964, 18) to bring it into conformity with the teachings of the Second Vatican Council.

vasive. Secondly, many curricular subjects, by their value-closed nature (*e.g.*, mathematics, modern foreign languages, chemistry) obviously do not admit of religious addition or gloss.

There is a limited area of other subjects (*e.g.*, history, social studies) which are naturally related to value-perspectives, and all education—public and private—bears witness to this fact. In this area great caution must be exercised in making broad generalizations, as appellants seek to do, concerning religious inculcation. This Court has been sensitively conscious of the difficulties involved in attempting to sort out ideas, concepts, outlooks or value-configurations as being "orthodoxies" or "religions". One difficulty arises from the fact that "religion" (in the constitutional sense) may exist apart from any sect, organization or body. *Engel* v. *Vitale,* 370 U.S. 421, 430 (1962). The term "religion" embraces belief broadly—not limited to the theistic. *Torcaso* v. *Watkins,* 367 U.S. 488, 495 (1961).* Quite properly public schools present to the impressionable child values and perspectives of reality and human destiny.** In the realm of instruction in value-related subjects, it is no easy task to determine when or to

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* *Accord, Washington Ethical Society* v. *District of Columbia,* 249 F.2d 127 (D.C. Cir. 1957). See generally Stahmer, *Defining Religion: Federal Aid and Academic Freedom,* in 1963 Religion & Pub. Order 127-131.

** ". . . any vital education will inescapably have a share in building the social order of the moment. Proceeding on such premises, we may conclude that education as well as politics is a process of discovering what values, are most worth. The School is one of the community's resources for social experimentation and, as such, should not be neglected." Brubacher, *Modern Philosophies on Education,* 194 (1962). "There is no teacher, no school, which can escape the problem of life orientation, the ultimate commitments by which every person must live." Phenix, *The Scholars Look at the Schools,* 18 (1962).

what extent a "religious" (Christian, Hebraic, secular humanist, for example) idea has entered into the process, or whether it has been entered in a manner rendering it inculcatory, or whether it has appeared in so great a degree that it could be said as a matter of law that a real effect of the instruction was to advance some religion or another. Appellants' argument comes down to the assertion that any given secular textbook (*e.g.*, Hallett, *Machine Shop Theory & Practice* (1962) (gr. 7-12), or Adams, *Great Negroes Past and Present* (1964) (gr. 7-9), or Herzberg, *Better English* (1960) (gr. 8), or Mallory, *New Mathematics in Practice* (1963) (gr. 9), or Carson, *The Sea Around Us* (1958) (gr. 9), or Pei, *Expressions de Tous Les Jours* (gr. 6-9))* is constitutionally innocuous when loaned to a public or private nonsectarian school pupil but that the identical book, when loaned to a pupil in a religiously-affiliated school, inexorably becomes so tainted that the mere fact of its being so loaned has the primary effect of advancing religion. The book itself does not change.

d. *If the Court upholds the Act, it " . . . would mean that a state could constitutionally underwrite the entire cost of parochial education . . . "* (Br. 15). This argument overlooks the role of this Court in constitutional matters. It also ignores the fact that this case deals solely with the loan of state-approved textbooks which are themselves secular and which are used by all students both within and without their respective schools. The status of any other legislative program relating to education of children at-

* All of the above cited textbooks are to be found in Textbook List, Board of Education—City of New York, For Use in Requesting Textbooks in Accordance with New York State Textbook Law.

tending religiously-affiliated schools which may be adopted by a state will not be automatically resolved by approval of this Act, but will depend on a judicial determination as to whether or not such program meets the test announced by this Court in *Everson* and *Schempp*.

* * * * *

In summary, we submit that the Textbook Loan Act has both a secular legislative purpose and a primary effect that neither advances nor inhibits religion. Accordingly, it does not constitute an establishment of religion.

## III.

### The Weight of State Court Authority Favors Constitutionality of the Act.

The New York textbook statute here under attack is not unique. Similar statutes are in effect in several other States:

Louisiana since 1928 (La. Rev. Stat. §§ 17:351, 17:352 (1963)).

New Mexico since 1929 (N.M. Stat. Ann. § 77-13-7 (Supp. 1967), *formerly* N.M. Stat. Ann. §§ 73-18-5, -9 (1953)).

Mississippi since 1940 (Miss. Code Ann., Tit. 24, § 6656 (1952)).

Rhode Island since 1963 (General Laws of Rhode Island § 16-23-2 (Supp. 1967)).

In addition West Virginia (since 1939) and Indiana (since 1921) have statutes providing in substance for the furnishing of free textbooks when the parents are financially unable to pay for them (W. Va. Code Ann. § 18-5-21b

(1966); Burns Ind. Stat. Ann. § 28-512 (1948)). Since 1913 Kansas has allowed private schools "the same privileges in the purchase and distribution of" textbooks published under the Kansas school book law as the public schools receive. (Kansas Stat. Ann § 72-4107 (1964)).

Appellants' discussion of cases allegedly showing a "trend" in state court decisions away from upholding the constitutionality of analogous textbook loan programs is misleading. (Br. 28-30). Decisions of the highest state courts in cases in which the furnishing of books to pupils in religiously-affiliated schools have been challenged may be grouped as follows:

1. *Rulings upholding constitutionality under both federal and state constitutions: Cochran* v. *Louisiana State Board of Education,* 168 La. 1030, 123 So. 664 (1929), *aff'd,* 281 U.S. 370 (1930); *Board of Education of Central School Dist.* v. *Allen,* 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967).

2. *Rulings upholding constitutionality under state constitutions—Establishment Clause of federal constitution not in issue: Borden* v. *Louisiana State Board of Education,* 168 La. 1005, 123 So. 655 (1929); *Chance* v. *Mississippi State Textbook Rating and Purchasing Board,* 190 Miss. 453, 200 So. 706 (1941) ("The state is under duty to ignore the child's creed, but not its need.").

3. *Ruling of unconstitutionality under state but not federal constitution: Dickman* v. *School District,* 232 Ore. 238, 366 P.2d 533 (1961).

4. *No ruling on federal or state constitutionality: Haas* v. *Independent School District,* 69 S.D. 303, 9 N.W.2d 707

(1943) (Furnishing of books *ultra vires* under statute making no mention of pupils in other than public schools); *Zellers* v. *Huff*, 55 N.M. 501, 236 P.2d 949 (1951) (Question of secular textbooks not in issue. Lower court enjoined free loan of "Catholic edition" textbooks to Catholic schools. No decision by New Mexico Supreme Court on the issue because of defect of parties, the Supreme Court lacking jurisdiction, under the facts, over the State Board of Education).

One lower court ruling has held such programs constitutionally invalid on both State and Federal grounds. *Bowerman* v. *O'Connor* (Superior Court of Providence County, Rhode Island, Equity No. 31775, decided September 19, 1968 and now on appeal to the Supreme Court of Rhode Island (No. 287-A).

From the foregoing it is seen that what state authority there is as a guide to decision in the instant case favors the constitutionality of the Act here involved. Two of the highest courts of states have upheld textbook programs under the federal constitution (Louisiana and New York). Three have upheld them under state constitutions having provisions barring aid to sectarian institutions (Louisiana, New York and Mississippi). The highest court of no state has declared such a statute to violate the federal constitution.

## IV.

**The Only Free Exercise Issue in This Case Is That Raised by Appellants' Demand That the Benefits of the Act Be Denied to One Particular Class of Children on the Ground That They Attend Religiously-Affiliated Schools.**

The Textbook Loan Act by its terms applies to *all* children in *all* schools which comply with the requirements of the compulsory education law. There are, of course, three types of such schools: (i) public schools; (ii) nonpublic schools which are *not* religiously affiliated; and (iii) nonpublic schools which *are* religiously affiliated. Appellants' attack is directed solely against children attending schools of type (iii). They now assert that to the extent, and only to the extent, that the Act requires textbooks to be furnished to children in religiously-affiliated schools, it violates the Free Exercise Clause, as well as the Establishment Clause. (Br. 31)

At the outset there is a question, unanswered by appellants' brief, as to the constitutional basis for their assertion that they as boards of education, and not as individual parents or taxpayers, are entitled to claim the benefits of the Free Exercise Clause. Their complaint (2a-7a) makes no mention of the Free Exercise Clause, and appears to rely (so far as their federal claim is concerned) solely on the Establishment Clause.

Putting aside this threshold issue as to standing, appellants' main "Free Exercise" contention is that the law "compels a man to contribute to the propagation of opinions which he disbelieves" (Br. 31, 35).

Appellants fail not only to say of whose opinions they complain, but of what opinions they complain. The Text-

book Loan Act, involving only secular textbooks, does not call for the propagation of any religious opinion, and presumably appellants do not complain about any opinions expressed in those textbooks. If they do so complain, their complaint would be equally applicable to any textbook given to any child in any school where the textbook contained material with which any taxpayer happened to disagree as a matter of conscience. For example, a Christian Scientist could object to the distribution of hygiene texts on the ground that he was being compelled to "contribute to the propagation of opinions which he disbelieves". The Free Exercise Clause, assuming that it can be raised by these appellants, does not require this extreme result.

In any case, appellants' vague and far-fetched charge that the Act somehow violates the Free Exercise Clause is sufficiently answered by the reasons we have already given which compel the conclusion that the Act does not violate the Establishment Clause.

Appellants' charge, however, triggers vital Free Exercise and Equal Protection concerns with respect to those *beneficiaries* of the Act who attend religiously-affiliated schools. They attend these schools under the compulsory education law. Where the State compels attendance at some school, and conscience (under constitutional protection) compels the selection of a particular school (where the requirements of law may be fulfilled), serious free-exercise problems would arise if those particular children were to be cut off from the benefits of a general public-welfare statute applicable by its terms to all children in the State.

As appellants would rewrite the Act, it would provide that secular textbooks must be loaned to pupils attending (i) public schools and (ii) non-public schools in which no

religious instruction is given, but that such textbooks must *not* be loaned to pupils attending (iii) any school in which religion is taught. The religious affiliation of the child (or of the school which he attends) would thus become the direct and sole test as to whether secular benefits generally available to all children should be granted or denied.

This would condition receipt of public benefits upon attendance at public schools or at private schools which are not religiously affiliated, in violation of the right of religiously-minded school children and parents to the free exercise of their religion. In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), this Court held that South Carolina had infringed an individual's right to the free exercise of religion by denying her application for unemployment compensation after her discharge for refusal to work on Sunday, the Sabbath day of her faith. Noting that it was

> "too late in the day to doubt that the liberties of religion . . . may be infringed by the denial of or placing of conditions upon a benefit or privilege" (374 U.S. at 404),

this Court declared that its holding

> " . . . but reaffirms a principle that we announced a decade and a half ago, namely that no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation.' *Everson* v. *Board of Education,* 330 U.S. 1, 16." 374 U.S. at 410. (Emphasis in opinion).

The educational liberty declared in *Pierce* does not exist *in vacuo*, as a thing apart from the real lives of real children in the real world of which education today is so large a part and the presence of welfare spending so great a factor.

This Court has never made such a ruling as appellants demand. It has looked to the development of liberty, not to its constriction. This has meant problems for the Court —none greater than that of resolving the inherent tension presented by the Establishment and Free Exercise clauses of the First Amendment. Such tension has been repeatedly pointed to by this Court—that

> " . . . the logical interrelationship between the Establishment and Free Exercise Clauses may produce situations where an injunction against an apparent establishment must be withheld in order to avoid infringement of rights of free exercise." *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 247 (Brennan, J., concurring) (1963)

The tension—and the possible conflict—between the two clauses is present in this case by virtue of the appellants' complaint and the nature of the relief which they seek. That conflict can be resolved, and full effect can be given to both clauses, by applying the principles laid down in *Everson* and *Schempp*. Under those principles we submit

> (i) this general public-purpose statute, applicable to *all* children, *including* those who attend religiously-affiliated schools, does not conflict with the Establishment Clause.
>
> (ii) the *exclusion* of a particular class of children, on purely religious grounds, from the benefits

of this general-purpose statute would raise serious questions under both the Free Exercise and Equal Protection Clauses.

## CONCLUSION

**It Is Respectfully Submitted That This Court Should Affirm the Judgment Below.**

Dated March 28, 1968

Respectfully submitted,

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## SUPPLEMENT A

## Text-Book Loan Act of 1965

Section 701, New York Education Law, as amended by Chapter 320 of the Laws of 1965 and Chapter 795 of the Laws of 1966 (effective September 1, 1966):

Section 1. Statement of policy. The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects. The Congress of the United States has reaffirmed the principle that the states and local communities retain primary responsibility for public education. It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state.

§ 701. Power to designate text-books; purchase and loan of text-books; purchase of supplies

1. In the several cities and school districts of the state, boards of education, trustees or such body or officer as perform the functions of such boards, shall designate text-books to be used in the schools under their charge.

2. A text-book, for the purposes of this section shall mean a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends.

3. In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, text-books. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities. Such text-books are to be loaned free to such children subject to such rules and regulations as are or may be prescribed by the board of regents and such boards of education, trustees or other school authorities.

4. No school district shall, during the school year nineteen hundred sixty-six–sixty-seven, the school year nineteen hundred sixty-seven–sixty-eight or the school year nineteen hundred sixty-eight–sixty-nine be required to purchase or otherwise acquire textbooks, pursuant to this section, the cost of which shall exceed an amount equal to fifteen dollars multiplied by the number of children residing in such district who on the first day of October, of such school year are enrolled in grades seven through twelve of a public or private school which complies with the compulsory

education law, or in any subsequent school year be required to purchase or otherwise acquire textbooks, the cost of which shall exceed an amount equal to ten dollars multiplied by the number of children residing in such district and so enrolled on the first day of October of such subsequent school year; and no school district shall be required to loan textbooks in excess of the textbooks owned or acquired by such district; provided, however that all textbooks owned or acquired by such district shall be loaned to children residing in the district and so enrolled in grades seven through twelve in public and private schools on an equitable basis.

5. In the several cities and school districts of the state, boards of education, trustees or other school authorities may purchase supplies and either rent, sell or loan the same to the pupils attending the public schools in such cities and school districts upon such terms and under such rules and regulations as may be prescribed by such boards of education, trustees or other school authorities.

6. The commissioner of education, in addition to the annual apportionment of public monies pursuant to article seventy-three of this chapter, shall apportion to each school district an amount equal to the cost of the text-books purchased and loaned by the district pursuant to this section, but in no case shall the aid apportioned to the district be in excess of the following amounts: a. on account of expenditures made during the school year nineteen hundred sixty-six–sixty-seven, the school year nineteen hundred sixty-seven–sixty-eight or the school year nineteen hundred sixty-eight–sixty-nine an average of fifteen dollars per pupil residing in the district and enrolled in grades seven through twelve, and

b. on account of expenditures made in any subsequent school year an average of ten dollars per pupil residing in the district and enrolled in grades seven through twelve.

7. The apportionment provided for in this section shall be paid, at such times as may be determined by the commissioner and approved by the director of the budget, during the school year in which the expenditures are made to the extent that such expenditures have been made and reported to the department prior to such apportionment. Expenditures by a school district in excess of the average of fifteen dollars per pupil in the school year nineteen hundred sixty-six–sixty-seven, the school year nineteen hundred sixty-seven–sixty-eight or the school year nineteen hundred sixty-eight–sixty-nine or in excess of ten dollars per pupil in any subsequent school year shall be deemed approved operating expense of the district for the purpose of computation of state aid pursuant to subdivision five of section thirty-six hundred two of the chapter, but expenditures up to such average of fifteen dollars or ten dollars above mentioned shall not be deemed approved operating expenses for such purpose.

## SUPPLEMENT B

### Opinion of Counsel No. 181

THE UNIVERSITY OF THE
STATE OF NEW YORK

Education [Seal] Department

To: City, Village and District Superintendents of Schools and Supervising Principals

Re: Chapter 320 of the Laws of 1965 relative to the purchase and loan of textbooks, as amended by chapter 795 of the Laws of 1966

Chapter 795 of the Laws of 1966, effective September 1, 1966, amends chapter 320 of the Laws of 1965 which is also effective September 1, 1966.

As amended by these two chapters, Article 15 of the Education Law, entitled "Text-Books", now provides as follows:

1. Designation of textbooks—public schools.

There is no change in the previous provisions of the Education Law, Section 701, subdivision 1. Textbooks will continue to be designated by the school board or trustee, for use in the public schools.

2. Change of designation of textbooks—public schools.

Section 702 has not been amended by either of the above chapters, and hence the limitation on changes of designation of textbooks for the public schools continues in effect

(changes in designation may be made only upon a three-fourths vote of the school board, or five years after designation).

3. Subversive textbooks—public schools.

Section 704, relating to subversive textbooks has not been amended by these chapters and likewise continues in effect without change, as does Section 705 relating to certain penalties.

4. Definition—New Law.

Subdivision 2 of Section 701 defines the term "Text-Book", for the purpose of Section 701 only, as "a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends". Reference books, workbooks, novels and other fiction, review books, test materials, materials in kit form and other supplementary books and material are not textbooks and may not be furnished.

5. Power and duty to purchase and to loan.

Subdivision 3 of Section 701 requires all school boards to purchase and to loan, "upon individual request", textbooks as defined above, to all children residing in the district who are attending grades seven through twelve in any public school and in any non-public school which complies with the Compulsory Education Law.

6. Limitations on kinds of textbooks.

In order for the mandate set forth in 5 above to become applicable, it is necessary that

a. The textbooks be non-sectarian (this eliminates denominational editions and those carrying the "imprimatur" or "nihil obstat" of a religious authority), and

b. The textbook had been "designated for use in any public elementary or secondary schools of the State or * * * approved by any school board".

c. In case of doubt as to a. above, the school board must make the appropriate determination; and in case of doubt as to b. above, the school board should make appropriate inquiries from the school board concerned, or else decide if it wishes to approve the same itself.

7. Fees and charges.

Section 701, subdivision 3, requires that the textbooks be "loaned free" to the children, but authorizes school boards to make reasonable rules and regulations. Such rules and regulations may contain requirements for reimbursement, by the student to the school district, for damage, loss or destruction of loaned textbooks.

8. Limit on requirement to purchase.

a. Subdivision 4 of Section 701 states that no district, during 1966-67, 1967-68 or 1968-69, will be required to purchase or otherwise acquire textbooks, under this section, at a total cost to the district in excess of $15 multiplied by the total number of resident students in grades 7-12, of public schools and private schools which comply with the provisions of the Compulsory Education Law, i.e., which provide at least substantially equivalent educational services and facilities (in the judgment of the school board

of the district of location of the non-public school) as the public schools of the district of location provide.

b. Textbooks need be, and may be, purchased only for resident pupils. Textbooks for children attending a school located in one district, but which children reside in another school district, must be provided by such other school district. Textbooks need not be provided for pupils residing in a school district in this State, but attending a non-public residential school in another State.

c. The term "otherwise acquired" textbooks, which term does not appear in the basic mandate "to purchase and to loan" (Section 701, subdivision 3) merely authorizes the acquisition, in compliance with the statute, as amended, by gift, or by consolidation of school districts, or by centralization occurring after September 1, 1966.

d. Subdivision 4 of Section 701 further states that no district *during 1969-70* or during any subsequent school year will be required to purchase or otherwise acquire textbooks under this section at a total cost to the school district in excess of $10 multiplied by the total number of resident students in grades seven through twelve of public and appropriate non-public schools.

e. For the purpose of this limitation on the requirement to purchase (or otherwise acquire) in 1966-67 and thereafter, the resident enrollment of public and non-public students in grades seven through twelve must be ascertained as of October 1 of each such year. An increase or decrease of enrollment after such date will have no effect on the requirements of the statute.

f. It must be noted that subdivision 4 of Section 701 does not *require* any district to expend *at least* $15 (or

$10) multiplied by the appropriate enrollment. The provision states in effect that even if the needs as resulting from other provisions of the statute are greater than that limitation, nevertheless no district need spend more than such limitation (see 15. below).

9. Summer school.

There is no requirement that a board purchase textbooks specifically for use at summer school; however, books may be loaned to the extent that they are on hand.

10. Purchase of textbooks.

Purchase orders for textbooks need to be awarded after competitive advertising to the lowest bidder, pursuant to General Municipal Law, Section 103 (unless a specific textbook can be procured only from the publisher in which case the competitive bidding procedure is not required).

Where students have been purchasing their own textbooks, the school board, if it wished to do so and considered this a wise procedure, could purchase such books from the individual students.

11. Textbook purchases are ordinary contingent expenses.

a. While the statute, unlike the transportation section, does not expressly so state, textbook purchases under this statute are clearly ordinary contingent expenses.

b. This is true even where a board of education purchases textbooks in excess of the dollar amount mandated by subdivision 4 of Section 701, since the *power* to purchase is expressly vested in the school board and the limitation of subdivision 4 applies only to the *duty* to purchase.

c. Hence, in cases where budgets are defeated by the voters, the board nevertheless has the duty to purchase up to the requirement, and has the power to purchase in excess of the mandate.

d. Likewise, in those cases where district budgets have been adopted at annual meetings in 1966, the school boards will nevertheless be required and authorized to make books available in September of 1966, irrespective of the amount contained in the budget.

12. "Upon individual request".

Under the statute, both the power and the duty to purchase and loan textbooks depend upon individual requests to the school board for such textbooks.

In compliance therewith, the nonpublic school could either forward such individual pupil requests to the school board collectively or keep such requests on file and forward merely a summary of the requests to the board of education. In any event, however, the requests of each student must be addressed to the board of education of the district of residence.

13. Date of payment for textbooks.

The amendments to the Education Law under which the new procedure is authorized and required, do not become effective until September 1, 1966. Hence, no payments for textbooks ordered under the new law can be made prior to such date.

While the effective date section of the bill makes no specific exception to this effect, textbooks may nevertheless be ordered prior to the effective date.

14. State aid.

a. Subdivision 6 of Section 701 provides that school districts will receive an additional amount of State aid "equal to the cost of the textbooks purchased and loaned by the district pursuant to this section, but in no case * * * in excess of the following amounts: a. On account of expenditures made during the school years 1966-67, 1967-68 and 1968-69, an average of $15 per pupil residing in the district and enrolled in grades 7-12, and b. on account of expenditures made in any subsequent school year an average of $10 per pupil residing in the district and enrolled in grades 7-12."

b. This means that districts will need to ascertain the total amount of money spent during each of these years for the purchase of textbooks loaned to students under the statute; thereafter the district will need to multiply the amounts of $15 and $10 respectively by the total number of resident students in grades 7-12 *as of October first* and the smaller of these two amounts (expenditure or ceiling) will be the amount of the special State aid due under subdivision 6.

c. Thereafter the amount, if any, resulting by deducting the amount of special aid arrived at under b. above, from the actual amount expended by the district for the purchase of textbooks, is added to the amount of approved operating expenses of the district pursuant to Education Law, Section 3602, subdivision 5.

d. The special aid under subdivision 6 (see b. above) is payable during the school year in which the expenditures are made to the extent that such expenditures have been made *and* reported to the Department prior to a date to

be set jointly by the Commissioner and the Director of the Budget (which will be announced).

e. Aid payable under c. above, if any, becomes payable during the school year following the year of expenditure, as is all other operating expense under subdivision 5 of Section 3602, unless the district receives its operating expense aid under that subdivision, as amended by Chapter 767 of the Laws of 1966, on the budget basis. In such case operating expense aid, including the amounts here involved, will be paid currently, subject to adjustments the following year.

f. The expenditures for textbooks not exceeding the mandate are not aidable under subdivision 5 of Section 3602.

g. If a district issues bonds or notes for the purpose of financing the purchase of textbooks under the statute, the State aid payments will need to be made currently based on debt service payments of the district. In such case the "expenditure" (meaning an expenditure from local district funds) would not be made until debt service is paid and hence the "expenditure" would be made, for instance, during 1967-68 if the books are purchased from the proceeds of obligations in 1966-67 and the first debt service payment is due in 1967-68. Consequently, the aid payment would [be] $10, rather than $15, multiplied by the appropriate enrollment figures, if the "expenditure" is made during the school year 1969-70, and the obligations are issued during 1968-69.

15. Procedure.

a. The first step for a district to take is to ascertain the needs of the public and non-public students, as ex-

pressed by requests for loan of textbooks, in the various subjects. This will result in finding the number of books needed in each subject.

b. The number of books needed in each subject then must be checked against existing book stocks. It is obviously unnecessary to duplicate textbooks owned by any of the schools involved and available for the respective student's use.

Existing book stocks and newly to be purchased textbooks will need to be distributed among the respective students on an equitable basis.

c. Having ascertained the number of textbooks needed in each subject, the total amount necessary to purchase all textbooks must then be checked against the limitation on mandated expenditures for the appropriate school year, as contained in subdivision 4 of Section 701 (see 8. above).

d. Unless the necessary dollar amount is within that limitation, the board of education will then need to decide whether it wishes to exceed such limitation (as indicated in 11 above, no vote of the district is necessary for this purpose).

e. If the amount needed is in excess of both the limitation and the amount by which the school board is willing to exceed that limitation, the board will need to determine how to utilize the funds thus available in order to best meet the needs of the pupils as expressed by the requests received, on an equitable basis. Since a board of education may not discriminate between individual students in either the public or the non-public schools it is suggested that in such case the board determine how many categories of textbooks (such as science, mathematics, social studies,

etc.) can be loaned free to both public and nonpublic pupils within the dollar amount thus available. Categories of textbooks not so included will then need to be purchased by the students themselves (unless other sources of funds are available).

16. Accounting and storage.

a. All books remain the property of the school district and must be treated as such. Such ownership should be indicated in or on each book by labels or other appropriate methods of identification.

b. There is no reason why textbooks used in a non-public school could not be stored in that school under an agreement with the school board and the governing body of the non-public school. The district may not, however, pay storage charges to non-public schools in this connection.

17. Textbooks for grades 1 through 6.

Section 703 of the Education Law (as amended by chapter 320 of the Laws of 1965) authorizes the qualified voters of common, union free, central and central high school districts, to vote a tax at an annual or special meeting for the purpose of providing free textbooks to all pupils enrolled in grades 1 through 6 of the public schools of the district. (City School Districts have their own provisions: §§ 2503, subd. 7 and 2854, subd. 7.)

18. Supplies.

Subdivision 5 of Section 701 authorizes school boards to purchase supplies and either to rent, sell or loan the same to the pupils in the public schools on appropriate terms and conditions.

19. Legal questions.

Any questions relating to the interpretation of Article 15 of the Education Law, as amended by both chapter 320 of the Laws of 1965 and chapter 795 of the Laws of 1966 should be addressed to the Office of Counsel or to the Law Division.

Sincerely yours,

/s/ CHARLES A. BRIND
Charles A. Brind

July 8, 1966

## SUPPLEMENT C

### Sample Instructions From Local Board of Education Under Textbook Loan Act

NISKAYUNA PUBLIC SCHOOLS

Schenectady 9, New York

This regulation is issued by authorization of the Niskayuna Board of Education.

A. Textbooks at the time of issuance are to be classified as follows:

1. New book.
2. Book has strong binding, unsoiled cover, no missing pages, no torn pages, and no marked pages.
3. Book has strong binding, unworn cover, no missing pages, no torn pages, and few marked pages.
4. Book has adequate binding, complete cover, no missing pages, and few torn or marked pages.
5. Book has binding, cover, and several missing, torn or marked pages.
6. Book has inadequate binding or cover, and many missing, torn or marked pages.

A newly bound book is to be in classification 3 or 4 depending on condition of contents.

B. The student is responsible for the protection of the textbooks issued to him. Normal depreciation of the hard cover textbooks is a reduction of not more than one

classification: i.e. a book issued in classification 1 is presumed to have been given proper protection if it is returned at the end of the course in classification 2 condition. Normal depreciation of soft cover textbooks is a reduction of not more than two classifications.

C. There shall be assessments for damage in excess of normal depreciation and for failure to return textbooks. The assessments stated as a percentage of current list price for damaged textbooks and for not returning textbooks are to be made:

| Damage to Books | | | Books Not Returned | | |
|---|---|---|---|---|---|
| Reduction in Classification | Hard Cover | Soft Cover | Classification when issued | If Replaced during year | If not returned end of course |
| 1 | 0% | 0% | 1 | 75% | 60% |
| 2 | 15% | 0% | 2 | 60% | 45% |
| 3 | 30% | 15% | 3 | 45% | 30% |
| 4 | 45% | 30% | 4 | 30% | 15% |
| 5 | 60% | 45% | 5 | 15% | 0% |
| | | | 6 | 0% | 0% |

D. Textbooks are not to be issued for the next semester or year to any student who has not paid any assessments for damaged or unreturned textbooks.

APS:ka
9-6-66

NISKAYUNA PUBLIC SCHOOLS

SINGLE STUDENT APPLICATION FORM PRIVATE SCHOOLS—NEW YORK STATE TEXTBOOK LAW, AS AMENDED—1966

PLEASE PRINT

Student's Name:..... Non-Public School Attending:.....
last first initial

Street Address:.....

Post Office:.....

Parent or Guardian Name:..... Request for school year Sept. 19..... to June 19.....

Address:.....

(leave blank if same as above)

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Application for Loan of Textbooks from Niskayuna Public School district, I hereby apply for the loan of the textbooks listed below, pursuant to provision of the New York State Education Act, Section 701, subdivision 2 and accept the obligations for use and return of the textbooks in accordance with regulations of the Niskayuna Public Schools shown on the reverse side.

Student's Signature:..... Date:.....

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| | Author | Title | Publisher | Edition | Date | Books Required for List Course | Grade | Price |
|---|---|---|---|---|---|---|---|---|
| 1 | | | | | | | | |
| 2 | | | | | | | | |
| 3 | | | | | | | | |
| 4 | | | | | | | | |
| 5 | | | | | | | | |
| 6 | | | | | | | | |
| 7 | | | | | | | | |
| 8 | | | | | | | | |
| 9 | | | | | | | | |
| 10 | | | | | | | | |
| 11 | | | | | | | | |
| 12 | | | | | | | | |

TOTAL NUMBER OF BOOKS REQUESTED:.....

Public School Official's Certification of Student's Request:

This is to certify that the applicant is a student in the above named non-public school and that the textbook he (she) requests are for use in the courses listed above.

Non-Public School Official's Signature:..... Date:.....

S-18

S-19

CODE—220-399-2-NYSTL REQ. NUMBER .....

# TEXTBOOK REQUISITION

PUBLISHERS NAME .....

STREET ADDRESS .....

CITY AND STATE .....

SHIP TO —EDISON WAREHOUSE

STREET —VAN GUYSLING AVE.

CITY & STATE—SCHENECTADY, N. Y.

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NO. COPIES ..... NAME OF BOOK ..... TOTAL .....

EDITION .....

GRADE LEVEL .....

PRICE PER BOOK ..... .....

Total Amount

I certify that the following number of children residing in your school district have individually requested the loan of the textbook indicated above for the school year 1967-68 in accordance with Section 701, subdivision 2, of the Education Law. Form 1 requests have been submitted to you for each child. I also certify that the textbook requested is a non-sectarian edition and approved for use by a New York State Public School District.

..... .....

Name of Parochial/Private School Official of Private School

## SUPPLEMENT D

### Rules of New York Board of Regents

### Admission, Privileges and Grades of Secondary Schools

3.30 Requirements and privileges. Secondary schools and academic departments of school districts in the State of New York may upon proper application and after official inspection be admitted to the University by a vote of the Regents. Such school shall afford not less than 175 days in each year of approved academic instruction, equipment and teaching force, and may hold Regents academic examinations in the subjects covered by their approved courses of study for the grades for which they are admitted.

3.31 Grades. Secondary schools shall be graded as junior high schools, middle high schools, industrial high schools, technical high schools, continuation high schools, and high schools, and the requirements therefor shall be as follows:

(a) A junior high school shall consist of the seventh, eighth and ninth grades, organized as a separate unit with approved courses of study and approved apparatus and library.

(b) A middle high school shall maintain an approved course of study covering one year of high school work above the eighth grade. It shall have approved apparatus and library.

(c) A high school (senior) shall maintain an approved four-year course of study above the eighth grade and shall

have approved apparatus and library. Such term shall include the six-year high school, covering the work of grades seven to twelve.

(d) Industrial high schools may offer one, two, three or four-year industrial or trade courses open to pupils who have completed the work of the ~~eighth~~ grade of the elementary schools. Such schools shall be organized as a separate unit with distinctive, approved courses of study and with approved equipment and facilities for industrial and trade education.

(e) Technical high schools may offer three or four-year general or specialized technical courses of secondary school grade. Such schools shall be organized as a separate unit with distinctive, approved courses of study and approved equipment for technical work.

(f) Continuation high schools may offer general or specialized courses open to pupils 16 and 17 years of age who are not regularly enrolled in the full-time schools. Such schools shall be organized as a separate unit with distinctive courses of study and equipment and facilities adequate for providing the proper instruction for working children.

## SUPPLEMENT E

### Regents Rules as to Registration and Approval of High Schools

**(Statutory authority: Education Law § 207)**

Sec.
100.1 The curriculum
Sec.
100.2 Organization and administration

Section 100.1 The curriculum. (a) An approved high school four-year course of study shall include the following units of work or their equivalent: English, 4 units; social studies including a year of American history, 3 units; science, 1 unit; health, ½ unit; and physical education. Science shall be included in the ninth year. A guidance and counseling program shall be provided, including the services of personnel certified for guidance service. These subjects shall constitute the "constants" or required subjects and shall be offered in accordance with the State syllabuses.

(b) The value of sequential work shall be recognized. To this end the program of each pupil shall be so planned that his own interests and abilities may be challenged. Each pupil shall follow through a three-year sequence in one of the following fields: science, mathematics, foreign language, music, art or drawing, business subjects, practical and industrial arts or vocational subjects.

(c) The additional units necessary to complete the minimum 16-unit program in the four-year high school or the 12-unit program in the senior high school shall be free

electives. The complete program offered in any particular school shall be determined in terms of the size of the school, the fundamental arts and interests of the community and the adolescent groups whose needs are to be served.

(d) The junior high school (or grades, 7, 8 and 9 in the six-year secondary school) shall include in its curriculum English, social studies, science, mathematics, health education, drawing, music and practical arts. There shall be a partial or complete departmental organization. The school shall give recognition to individual differences in capacities, tastes and abilities in the organization and technique of class work. There shall be a definite and effective plan of pupil guidance, including the services of personnel certified for guidance service.

100.2 Organization and administration. (a) A high school shall require for graduation the completion of a secondary school course including the curriculum constants and covering a minimum of 16 units in grades 9 to 12 or 12 units in the senior high school, grades 10 to 12, exclusive of units that may be granted for physical education. A unit is defined as a year's work in one subject requiring four or five periods weekly of prepared classroom work throughout the school year or the equivalent. The minimum length or a recitation period shall be 40 minutes, exclusive of the time used in changing the classes or teachers. The distribution of the secondary school course over a longer period or excellence of results shall compensate for varying schedules.

(b) Nothing herein contained, however, shall prevent a board of education from making such curriculum adaptations as are necessary to meet local needs and conducting

such experimentation as may be approved by the commissioner. This principle of flexibility shall apply to every area of the curriculum. The exercise of initiative and responsibility on the part of local school authorities in the administration of the curriculum is encouraged.

(c) The efficiency of instruction, the acquired habits of thought and study, the general intellectual and moral level of the school are paramount factors in determining its standing. Only schools which rank high in these qualities, as shown through competent, sympathetic inspection, as well as through the provision that is made for meeting individual pupil and group needs, should be considered eligible for full high school grade.

(d) A sufficient number of qualified teachers must be provided to care adequately for all instruction offered. An approved high school shall have a salary schedule which is sufficient to secure teachers with proper qualifications.

(e) The number of daily periods of classroom instruction for a teacher should not exceed five. A school requiring of any teacher more than six teaching periods a day, or a daily teaching load of more than 150 pupils, should be able to justify the deviation from this policy.

(f) The location and construction of school buildings and equipment shall be such as to secure hygienic conditions for both teachers and pupils. The library and apparatus facilities shall be such as to meet adequately the needs of instruction in the several subjects of the curriculum.

(g) No new public high school shall be recommended for registration by the Commissioner of Education sub-

sequent to December 1, 1961, unless it has an enrollment of more than 700 pupils in the upper six years except where it can be demonstrated to the satisfaction of the commissioner that density of population, transportation distances or other factors indicate that the registration of a school with greater or less enrollment is essential to the educational welfare of the children.

(h) No new public high school shall be recommended for registration by the Commissioner of Education subsequent to December 1, 1961, if, in his judgment, the establishment of such school would conflict with an approved plan for district reorganization, except where it can be established to the satisfaction of the commissioner that such school is essential to the educational welfare of the children.

(i) Nothing herein contained shall affect schools already registered.

The University of the State of New York
Education Department

Be it known that

having satisfactorily passed examinations in the subjects prescribed for the completion of an approved four year course in the

is thereby entitled to this

# High School Diploma

In witness whereof the Regents issue this diploma under seal of the University at Albany in the month of 19

James E. Allen, Jr.
President of the University and Commissioner of Education

Principal

SUPPLEMENT F

Regents High School Diploma
With Record Sheet and Examination and
Certification Requirements

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
BUREAU OF ELEMENTARY AND SECONDARY EDUCATIONAL TESTING
ALBANY, NEW YORK 12224

# RECORD SHEET FOR ISSUANCE OF STATE REGENTS HIGH SCHOOL DIPLOMA

Pupil..... School.....

| SUBJECT | SCHOOL | DATE WRITTEN MO. YR. | RATING IN REGENTS EXAMINATION | RATING IN EXAMINATION IN LIEU OF REGENTS | SCHOOL RATING (IN CERTIFIED SUBJECTS ONLY) | UNITS OF CREDIT |
|---|---|---|---|---|---|---|
| **Group 1. Constants** | | | | | | |
| English | | | | | | |
| World history | | | | | | |
| American history 1 | | | | | | |
| American history 2 | | | | | | |
| American history and world backgrounds III | | | | | | |
| Social studies (ninth year) | | | | | | |
| | | | | | | |
| Mathematics (1 unit) | | | | | | |
| | | | | | | |
| Science (ninth year) | | | | | | |
| | | | | | | |
| Health | | | | | | |
| | | | | | | |
| **Group 2. Sequence** | | | | | | |
| | | | | | | |
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| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| **Group 3. Electives** | | | | | | |
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| | | | | | | |
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| | | | | | | |
| | | | | | | |

NOTE: 1. In addition to passing the Comprehensive English Regents Examination, the pupil must have satisfactorily completed 4 units of English, by appropriate study or local examination, as certified by the principal. Indicate in the last column the number of units in English actually completed by the student.
2. If subjects other than health, ninth year social studies (world regions) or ninth year science (general science) are offered in lieu of these subjects, write in the full name of the subjects offered.
3. Indicate the subject offered to fulfill the 1 unit requirement in mathematics.
4. Ninth year science and mathematics (1 unit) when used in a sequence under group 2, should be listed there and not under group 1.

NOTE: 1. List here the subjects offered for the 3-unit sequence, and also the subjects offered for endorsement of the diploma in a special field.
2. Enter Regents examination ratings in all subjects in which Regents examinations are given and required.

NOTE: 1. Write in names of subjects offered to make the total of at least 18 units.
2. Regents examination credit is not required in group 3.

*Diploma action:*

☐ State Regents High School Diploma issued, dated.....
☐ Diploma issued with special endorsement in .....
☐ Diploma issued with honor

Signed .....

Title .....

NOTE: Satisfactory completion is required of an approved 4-year high school course, including the instruction required by law in civics, physiology, and hygiene (included in social studies, science, or health courses) and physical education.

DET 343
X5017-O47-100,000(53373)*

[OVER]

# EXAMINATION AND CERTIFICATION REQUIREMENTS FOR A STATE REGENTS HIGH SCHOOL DIPLOMA

## Group 1. Constants

The satisfactory completion of each of the following and the passing of Regents examinations in English and in: (*a*) world history and American history I, or (*b*) world history and American history II, or (*c*) American history and world backgrounds III (comprehensive).

| | |
|---|---|
| English | 4 units |
| Social studies | 3 or 4 units |
| Mathematics | 1 unit |
| Science (ninth year) | 1 unit |
| Health (either a ½-unit course or its equivalent in biology or homemaking at the senior high school level) | ½ unit |

## Group 2. Sequence

The satisfactory completion of a 3-unit sequence in one of the fields named below, with passing of Regents examinations where these are given and required: agriculture, art, business subjects, foreign languages, homemaking, horticulture, industrial arts, mathematics, mechanical drawing, music, science, technical subjects, trade subjects ..... 3 units

## Group 3. Electives

Certification by the principal to the successful completion of additional approved courses to make a total of 18 units.

Total ..... 18 units

NOTE: (1) Satisfactory completion is required of an approved 4-year high school course, including the instruction required by law in civics, physiology and hygiene (included in social studies, science, or health courses), and physical education. The 1-year mathematics requirement in group 1 can be satisfied by ninth year mathematics, general mathematics, business mathematics, or the equivalent, as a course in related mathematics.

(2) A unit is the value given to a study which is pursued 4 or 5 periods a week for a minimum of 40 minutes for each period exclusive of the time used in changing classes or teachers, for a school year of not less than 180 days and involving an equal amount of time in preparation outside of the classroom (shop and laboratory courses excepted).

(3) In a subject in which Regents examination credit is required for the State Regents High School Diploma, it is not Department policy to grant Regents examination credit on the basis of a local examination administered in lieu of the Regents examination. However, in a school system that still maintains a regular semiannual program of admission and promotion, if a pupil is unable at the time of graduation to qualify for a State Regents Diploma or for special endorsement because he lacks Regents examination credit in one of the two or three subjects needed for a sequence, request may be made to the Department for certification of credit in this subject by the principal on the basis of the local examination written by the pupil in January.

### Special Endorsement of Diplomas

A Regents diploma may be issued with special endorsement in an elective sequence if the student has completed a total of 4 units of study in that subject and has passed Regents examinations in the courses completed, where such Regents examinations are offered. For example, a diploma may be issued with the notation "Special Endorsement in French" if the student has completed a 4-unit sequence in French and has passed the 3-year Regents examination. A diploma may be issued with "Special Endorsement in Mathematics" if the student has completed a 4-unit sequence in mathematics and has passed Regents examinations in all subjects taken by the student in which a Regents examination was offered (except ninth year mathematics). Similarly, a diploma may be issued with special endorsement in subjects in which Regents examinations are not regularly administered, such as art, music, homemaking, technical subjects, etc., if the student has completed 4 units of study therein. A student may be given special endorsement in more than one subject, if appropriate.

However, the special endorsement in science shall be reserved for students who have not only completed 3 units in the advanced sciences but have also completed 3 units in mathematics. The science sequence must include Regents examination credit in three courses selected from biology, chemistry, earth science, or physics. The mathematics must include Regents examination credit in 10th year and 11th year mathematics. If these requirements are met, the diploma may be issued with the notation "Special Endorsement in Scientific Subjects."

### Honors Diploma

A diploma may be issued "with honor" if the student has earned an average of at least 90 percent in the Regents examinations required for the diploma under groups 1 and 2. Regents examination marks in other subjects may not be included. For example, if biology is substituted for general science but is not used to fulfill the group 2 requirements, the Regents examination is not required for the diploma.

For the purposes of computing the average, each Regents mark carries a weight of 1; it is not multiplied by the number of units (e.g., English — 92 percent, world history — 85 percent, American history 1 — 90 percent, Latin 2 — 93 percent; total 360 divided by 4 = 90 percent).

### Special Endorsement With Honor

To qualify for the notation "Special Endorsement in .... With Honor," a student must achieve a Regents examination average of at least 90 percent in English, social studies, and the subjects qualifying for special endorsement.

If a student cannot qualify for this combined notation, but can qualify for either the honors notation or special endorsement, then he must choose the notation with which he wishes the diploma to be issued. Obviously, both notations should not be used unless the student actually qualifies for the notation "Special Endorsement in.... With Honor."